TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 131.

SAN ANTONIO TRACTION COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE A. ALTGELT, SUING HEREIN BY HIS NEXT FRIEND, GEORGE C. ALTGELT.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED DECEMBER 3, 1904.

(19,546)

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1 & 2 Caption.

STATE OF TEXAS,
Fourth Supreme Judicial District.

Be it remembered that there was begun and holden in the city of San Antonio a term of the honorable court of civil appeals of the fourth supreme judicial district of Texas, which term began on Monday October 5th, A. D. 1903, the same being the first Monday in October, A. D. 1903, and adjourned on Wednesday, June 29th, A. D. 1904, and during the said term of said court the following case (being an appeal from the 37th judicial district of Texas, Bexar county, the said case in the said trial court being styled and numbered—George A. Altgelt by next friend George C. Altgelt—plaintiff *vs.* San Antonio Traction Company, defendant No. 14906) came on for final determination and adjudication by the said honorable court of civil appeals, to-wit: No. 3003 San Antonio Traction Company, appellant *vs.* George A. Altgelt, appellee—and the following proceedings were had in said cause, to wit:

3 Caption.

THE STATE OF TEXAS,
Bexar County.

At a term of the district court of the thirty-seventh judicial district *court* begun and holden at San Antonio within and for the county of Bexar, before the Hon. John H. Clark, judge thereof presiding, and which adjourned on the 31st day of October, A. D. 1903, the following came on for trial, to wit:

GEORGE A. ALTGELT, by Next Friend, GEORGE C. Altgelt, Plaintiff,
vs.
SAN ANTONIO TRACTION COMPANY, Defendant. } No. 14906.

4 Plaintiff's Original Petition.

THE STATE OF TEXAS,
County of Bexar.

In District Court of Bexar County, 37th Judicial District of Texas.

To the Hon. John H. Clark, judge of said court:

Your petitioner, George A. Altgelt, a minor, suing herein by his next friend, George C. Altgelt, and complaining of the San Antonio Traction Company, respectfully shows to the court:—

That plaintiff resides in said county of Bexar, and that the defendant is a corporation duly incorporated and has its principal office in the county of Bexar:

That said defendant, The San Antonio Traction Company, is a street railway corporation and is engaged in the business of common carrier of passengers for hire over many of the streets of the city of San Antonio, in Bexar county, Texas, and that it owns and operates a system of electric street railway cars to carry and so does carry and convey passengers for hire over its said line on the streets of said city.

That said George A. Altgelt is a minor living with his father, the said George C. Altgelt, and suing herein as next friend. That he, the said George A. Altgelt, resides in the city of San Antonio and is an inhabitant thereof; that he is fourteen years of age and under the age of seventeen.

That said George A. Altgelt is a student in a private school in said city, to-wit: the school known as Magruder's school for boys, situated within the limits of said city, and in which school the regular and elementary branches of learning are taught. That he is a regular attendant upon said school, and so has been a regular attendant thereon since the 7th day of September, 1903, and expects and intends to so continue in regular attendance for the scholastic year and term thereof which will end on or about the 1st day of June, 1904.

That J. B. Magruder is the principal of said school and a teacher therein and that said George A. Altgelt is pursuing a grade of learning therein, which said grade of learning in said school is not higher than the grades of the public high schools of this State within or adjacent to said city of San Antonio.

That the place of residence of said George A. Altgelt, and
5 the place where the school is situate, are some distance apart it being about two miles, and that it is convenient and proper for said George A. Altgelt in going to and coming from said school, in his attendance thereon, to make use of the electric street cars of said defendant, The San Antonio Traction Company, over the public streets of said city, by way of River avenue, Grand avenue, Austin street, Tenth street and Avenue C, over each of which said streets the system of street railway operated by said defendant passes.

That said George A. Altgelt, desiring to obtain transportation over and upon said system of street railway of defendant, and for the purpose of going to said school and returning therefrom, having obtained the consent of his father and desiring to obtain the advantage of half-fare rates secured by law for students attending school in said city and desiring passage on the street railways therein for such purpose, on the 19th day of September, 1903, through his said father, applied at the principal office of said defendant company for a lot of twenty half-fare tickets, such as are contemplated by law to be sold to students regularly attending school, and then and there demanded from defendant a lot of twenty half-fare tickets

to be issued to him, and at said time and place then and there exhibited and tendered to said defendant company a certificate from the principal of said school so attended by said George A. Altgelt, showing him to be entitled to such tickets, to-wit: a certificate signed and issued by J. B. Magruder principal of said Magruder school for boys, certifying that said George A. Altgelt is a regular scholar attendant upon said school; that he is under the age of seventeen years and in regular attendance upon said school as aforesaid and is in a grade thereof not higher than the grade of the public high schools of this State situate within or adjacent to said city of San Antonio. That said school is situate on Dallas street in said city of San Antonio and the regular sessions for the term of A. D. 1903–1904, began on the 7th day of September, A. D., 1903, and will end on or about the 1st day of June, A. D., 1904.

Complainant further shows to the court that the regular fare charged adults by defendant company for each fare over said line, is the sum of five cents for each continuous single trip, and that half-fare thereof would be the sum of two and one-half cents for each such trip, or the sum of fifty cents for a lot or twenty of
6 such tickets, each good for one fare, and that there was then and there, at such time and place aforesaid offered and tendered to said defendant company on behalf of said George A. Altgelt, by the said George C. Altgelt, his father, the sum of fifty cents in lawful money of the United States of America in payment for such lot of twenty such half-fare tickets, to be issued to said George A. Altgelt, as such attendant on said school and as aforesaid;—but that defendant then and there refused such tender of payment and then and there failed and refused to furnish or sell to complainant such tickets or lots thereof as so demanded and requested, and denied plaintiff's application therefor.

Plaintiff further shows to the court that by such failure and refusal on part of the defendant to so issue and sell said ticket- to him, he is refused the legal right to use and ride upon defendant's said cars in attending said school from day to day, which right is secured to him by the laws of this State and that the defendant persists in its refusal to issue such tickets to him for such rate and fare, although he is fully entitled to same and is always ready and willing, and so was ready and willing to pay the proper and legal rate therefor, to-wit: fifty cents for such lot of 20 tickets and to in all other things comply with the provisions of the law.

Premises considered plaintiff prays that the defendant be cited to appear on a day certain, to be fixed by the court, to show cause if any it has, why a *pre*-emptory writ of mandamus should not issue commanding it to issue to plaintiff the said tickets demanded of it, as in such cases provided by law, and for his costs of court.

AUG. E. ALTGELT,
Attorney for Plaintiff.

STATE OF TEXAS, }
County of Bexar. }

Before me, Isaac Chas. Baker, a notary public, in and for Bexar county, Texas, on this day personally appeared George C. Altgelt, who, after being by me duly sworn, on his oath says, that the allegations of the aforesaid petition are true.

GEO. C. ALTGELT.

Subscribed and sworn to before me by the said George C. Altgelt on this 22nd day of September, A. D. 1903.

ISAAC CHAS. BAKER,
[SEAL.] Notary Public, Bexar County, Texas.

7 In the above matter, it is ordered that the clerk of the court do issue notice of this application to the defendant requiring said defendant to appear before me at the court house of Bexar county, Texas, on the 28th day of September, A. D., 1903, at 10 o'clock a. m., then and there to show cause, if any it has, why the pre-emptory writ of mandamus should not issue.

JOHN H. CLARK,
Judge of the District Court, 37th Judicial District of Texas.

Filed Sept. 22, 1903.
GEO. SURKEY,
Cl'k D. C., Bexar County, Texas,
By F. L. RILEY, Deputy.

Defendant's First Amended Original Answer.

In the District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, by Next Friend, }
vs. } No. 14906.
SAN ANTONIO TRACTION COMPANY. }

Now comes the defendant, San Antonio Traction Company, and leave of the court first had files this its first amended original answer herein in lieu of its original answer hereinbefore filed on the 28th day of September, 1903, and for amendment says:

Defendant demurs and excepts to the original petition for mandamus and says the same is insufficient in law to entitle plaintiff to have and maintain his suit in the manner and form as charged and shows no right of action against this defendant.

Should the foregoing general exception be overruled, then specially excepting to said petition, this defendant says the same is insufficient to entitle plaintiff to the relief asked, for the following reasons, to-wit:—

First.

It does not appear from said petition that plaintiff is without remedy at law for any wrongs alleged in said petition.

Second.

It does not appear from said petition that plaintiff has a clear legal right prescribed by law and that plaintiff's allegations are not sufficiently specific to put defendant upon notice, only alleging
8 as they do, the conclusion of the pleader and do not allege any specific or definite provision of the law, showing a clear legal duty upon the part of defendant and a right upon the part of plaintiff.

Third.

It does not appear from said petition whether plaintiff is invoking a statute of the State, an ordinance of the city or provision of defendant's franchise or charter and said allegations of plaintiff's legal right and defendant's legal duty are too vague, indefinite and uncertain to require defendant to answer herein.

Fourth.

It does not appear from said petition that plaintiff or anyone for him applied to any officer or agent of defendant for the tickets in question or to what officer or agent he made application.

Fifth.

It does not appear from said pleading that plaintiff is entitled to ant right by reason of his attendance upon "Magruder's school for boys."

Sixth.

If this proceeding be based upon chapter CXVI of the general laws of the 28th legislature of Texas, entitled:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons and providing penalties for violation of this act."

then this defendant specially excepts to this action, because said act of the legislature is unconstitutional and void as to this defendant, in that it is in violation of section 7, of article 10, of the constitution of this State, in that by it the legislature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the constitution.

Seventh.

Said act of the legislature is unconstitutional because the same contains more than one subject and because the subject of said act is not expressed in its title as required by section 35, article 3, of the constitution of Texas.

9 Eighth.

Said act is in violation of the constitution of this State because it is local and special legislation and was not passed in accordance with constitutional requirements for legislation of that character.

Ninth.

Said act is unconstitutional because it is class legislation in that it imposes burdens upon certain persons, including this defendant, while permitting special privileges to others of the same class and business.

Tenth.

Said act is unconstitutional and void as to this defendant, because its enforcement is calculated to and will deprive this defendant of its revenues and property without compensation and without due process of law.

Eleventh.

Said act of the legislature is in violation of section 10 of article 1, of the Constitution of the United States and of section 16 of article 1 of the constitution of Texas, and in violation of section 1 of the 14th amendment to the Constitution of the United States and of section 17 of article 1 of the constitution of Texas, because said act impairs the obligation of the valid and subsisting contract existing between this defendant and the city of San Antonio and deprives this defendant of its property without due process of law and without compensation therefor.

HOUSTON BROS.,
Attorneys for Defendant, San Antonio Traction Co.

Should the foregoing general and special demurrers and exception be overruled and defendant held to answer, then this defendant answering herein says:

1st. It denies all and singular each and every material allegation in plaintiff's petition contained and pleads not guilty and asks that plaintiff be required to furnish strict proof.

2nd. And this defendant specially denies that the plaintiff or anyone for him made any application for said tickets to any officer or agent of this defendant authorized to issue or to refuse to issue or sell such tickets and avers the fact to be that no such demand was made upon any such officer or agent of this defendant.

3rd. This defendant specially denies that plaintiff or anyone for him, presented any certificate in accordance with or as required by law to any officer or agent of this defendant, authorized to issue or sell or to refuse to issue or sell any such tickets as those alleged in the petition, or showed any right upon his part to demand or
10 to purchase any such ticket- and avers the fact to be that no such certificate was presented to any such officer or agent of this defendant.

4th. The defendant specially denies that the plaintiff herein by George C. Altgelt, his father, did tender the sum of fifty cents to any officer or agent of this defendant authorized to issue or sell or to refuse to issue or sell said tickets and avers the fact to be that no such tender was made to any such officer or agent of this defendant and that no such officer or agent of this defendant refused to furnish or sell the complainant such tickets as he demanded.

5th. Should the defendant be held to further answer, then specially answering, it says that heretofore, to-wit: on the 2nd day of May, 1874, the San Antonio Street Railway Company was chartered by special act of the legislature of the State of Texas, and that section 8 of said act reads as follows:

"That all contracts made or entered into by and between the mayor and aldermen of the city of San Antonio and said company, or any privileges or rights granted by said mayor and aldermen of the city of San Antonio to the said company, shall be in all respects, legal and binding on the aforesaid contracting parties."

That on October 5th, 1875, the city of San Antonio, by an ordinance granted to the said San Antonio Street Railway Company, with certain conditions and limitations, the right to construct and operate its street railway lines on the streets, alleys and plazas of the city of San Antonio. That in said ordinance no provision was made limiting the amount that might be charged for fares over the lines of said company and no provision was made requiring said company to do any part of the street paving or improvement of the streets of the city occupied by its lines and that no transfers from one line to another were required. Subsequently, on the 16th day of March, 1899, the city council of the city of San Antonio extended the term of said company's franchise, imposing upon it additional burdens and limitations in consideration of its extension among others, enacting that it should do certain parts of the street improvements upon the streets occupied by it and fixing the rate of fares which should be charged as well as the transfers which should be granted by the company to its passengers, a copy of which provision is as follows:

"4th. Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the
11 extension hereby granted, pave all tracks between the rails and all the space between the double tracks, and twelve (12) inches on the outside of their tracks, on any street occupied by them or either of them which shall hereafter be paved by the city, as and

when the city paves, and with the same material as used by the city, and shall keep the same in reasonable repair and in like condition as the city keeps adjoining streets.

"That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.

"SECTION 2. The rights, privileges and franchises, or either of them herein referred to and hereby extended may be assigned by the grantee or grantees to any person or corporation, but the conditions and limitations of this ordinance shall apply to the assignee thereof."

That subsequently, the defendant San Antonio Traction Company lawfully acquired all of the property, rights and franchises and assumed all the duties and obligations of the San Antonio Street Railway Company under said ordinance and contract with the city of San Antonio and on the 7th day of August, 1900, all said rights, privileges and franchises contained in said ordinance granted to the San Antonio Street Railway Company were confirmed to the present company, imposing upon it likewise all the burdens, obligations and limitations of said ordinance. The terms of said ordinance and franchise were duly accepted according to the provisions thereof by this defendant company, which now operates thereunder something over forty miles of railway in the city of San Antonio, and under said ordinance and contract has paid large sums of money towards street paving and improvements, under the requirements and terms thereof.

Wherefore this defendant says that it has a lawful and binding contract with the city of San Antonio, by which it has the contract right to charge the sum of 5c. for each passenger riding upon its lines and avers that the plaintiff is proceeding herein under an act of the legislature, entitled:— "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen
12 years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act," being chapter CXVI of the General Laws of the 28th Legislature, page 182 and this defendant says that said act of the legislature is unconstitutional and void as to this defendant, because the same is in violation and contravention of section 10 of article 1 of the Constitution of the United States and of section 16 of article 1 of the constitution of Texas, in that it impairs the obligation of said lawful valid and subsisting contract existing between this defendant and the city of San Antonio; and said act is in violation of section 1 of the fourteenth amendment to the Constitution of the United States and of section 17, article 1 of the constitution of Texas, because said act deprives this defendant of its property and revenues without due process of law and without compensation therefor.

6th. And for further special answer, this defendant avers, upon information and belief, and it verily believes that this suit is instituted, not because plaintiff has been deprived of, or is seeking any substantial relief or benefit from the same, but for the sole and only purpose of testing the validity of said statute.

Wherefore it says that no substantial relief or benefit is to accrue to or for the benefit of the plaintiff by reason hereof and plaintiff is therefore not entitled to the relief sought.

Premises considered, defendant asks that the writ of mandamus be denied and for general relief.

HOUSTON BROS.,
Attorneys for Defendant, San Antonio Traction Company.

STATE OF TEXAS,
County of Bexar.

Before me the undersigned authority on this day personally appeared Regan Houston, who after being by me duly sworn upon oath deposes and says that he is the president of the San Antonio Traction Company, and that the facts set forth in the foregoing answer are true.

REGAN HOUSTON.

Sworn to and subscribed before me, this 3rd day of October, 1903.
[SEAL.]
J. R. DAVIS,
Notary Public, Bexar County, Texas.

13 Filed, October 27, 1903.

GEORGE SURKEY,
District Clerk, Bexar County,
By H. SCHRAMM, Deputy.

Plaintiff's First Supplemental Petition.

In the District Court of Bexar County, 37th Judicial District of Texas.

GEORGE A. ALTGELT, by Next Friend, GEO. C. ALTGELT,
vs.
SAN ANTONIO TRACTION COMPANY.
No. 14903.

In the above entitled cause comes now the plaintiff and with leave of the court first had and obtained, files this his first supplemental petition and thereupon demurs to defendant's amended original answer filed herein on October 20th, 1903, upon the following grounds. First, because said answer and return constitutes no defense to plaintiff's suit.

2nd. Plaintiff specially excepts to that paragraph of defendant's said answer to the merits of this cause wherein it pleads a general

denial and enters a plea of not guilty, because he says that said general denial and plea of not guilty constitutes no defense and no answer to plaintiff's original petition.

3rd. Plaintiffs specially excepts to that paragraph of defendant's said answer wherein it pleads that it lawfully acquired all the property, rights and franchises and also all the duties and obligations of the San Antonio Railway Company under an ordinary and supposed contract with the city of San Antonio, because he says that matters so alleged and set out constitute no defense to plaintiff's statement of facts.

4th. Plaintiff further specially excepts to those paragraphs of defendant's said amended answer wherein it pleads that it acquired all the property, rights and franchises and alleges an obligation on its part towards the city of San Antonio to construct and maintain parts of the streets over which its said lines are laid and to keep such streets in repair, and further attempts to recite a binding contract between it and said city of San Antonio regulating the charges of transportion over its said lines at a fixed amount of five cents per passenger for this, that said matters and things constitute no defense to plaintiff's said action.

14 5th. Plaintiff further excepts to said allegations of defendant reciting that it lawfully acquired all of said property, rights and franchises, because said allegations does not show how defendants lawfully acquired said property and rights, and because said allegations do not allege that the San Antonio Street Railway Company, had acquired the rights of franchise from the city of San Antonio to operate a street railway upon the particular streets named in plaintiff's petition.

6th. Plaintiff further specially excepts to that paragraph of defendants said amended answer which pleads that the granting of the half fare to children under the age of seventeen years is onerous on defendant and a taking of its property without due process of law, for this, that no facts are alleged to sustain said plea.

7th. Plaintiff specially excepts to that paragraph of defendant's said answer aver-ing upon information the belief that this suit was instituted, not because plaintiff has been deprived of seeking any substantial relief or benefit from the same, but for the sole purpose of testing the validity of said statute, because he says that the said paragraph of defendant's said answer constitutes no defense of this suit and states conclusions only.

Plaintiff therefore prays judgment of the court upon the sufficiency of said petition and for his costs.

AUG. E. ALTGELT,
Attorney for Plaintiff.

Should the foregoing, general and special demurrers be overruled by the court, plaintiff avers and shows that that portion of the statement of defendant that the street railway owned by defendant and operated by it over River and Grand avenues and whereon plaintiff

seeks to ride was never owned by the San Antonio Street Railway Company as alleged by defendant and was not by it acquired from or under said San Antonio Street Railway Company, or its assigns, but that the franchise to operate a street railway upon said River Ave. and Grand avenue, and under which it now does operate a street railway line on said line, was acquired by *these* defendants by original grant from the city of San Antonio on or about the 7th day of January, 1901.

Plaintiff further avers and shows to the court that the defendant the San Antonio Traction Company was incorporated in the
15 year 1900, under the general incorporation laws of the State of Texas.

Plaintiff therefore prays relief as prayed for in his original petition.

AUG. E. ALTGELT,
Attorney for Plaintiff.

Filed, October 27th, 1903.

GEORGE SURKEY,
District Clerk,
By H. SCHRAMM, Deputy.

Plaintiff's First Trial Amendment.

GEORGE A. ALTGELT, by Next Friend,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Comes plaintiff and files this his first trial amendment and therefore alleges that the demand upon defendant corporation and tender to defendant was made by Geo. C. Altgelt at defendant's principal office at San Antonio, Texas, upon a person in said office whose name is unknown to plaintiff. That Regan Houston, president of defendant corporation was then in the rear part of said office, but not within the hearing of said Geo. C. Altgelt. That said principal office is divided by a railing and that the rear part of said office is not accessible to the public, but that all business with the public on the part of defendant is transacted in the front part thereof through employees or agents where said Altgelt made said demand and tender; that the person upon whom said demand was made and to whom said tender was made was within sight of said Regan Houston, president as aforesaid, and that at the window where said persons transact business, there is a plain sign, San Antonio Traction Company.

GEO. C. ALTGELT.

Plaintiff prays as in his original petition.

GEO. C. ALTGELT, Attorney.

Filed, October 27, 1903.

GEORGE SURKEY,
District Clerk, Bexar County,
By H. SCHRAMM, Deputy.

16 Decree.

In District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, Suing Herein by Next Friend, Geo. C. Altgelt,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

On this 29th day of October, 1903, this cause being regularly called for trial, the defendant presented to the court its general and special exceptions to plaintiff's pleading herein, which having been heard and considered by the court, together with arguments thereon, the court found the law with plaintiff and it is considered, ordered, adjudged and decreed by the court that said exceptions be and the same are hereby overruled to which order of the court, the defendant then and there in open court excepted.

Thereafter on the same day the plaintiff and defendant announced ready for trial and no jury having been demanded, all issues of fact as well as of law were submitted to the court, who having heard the pleading, evidence and argument of counsel found both the law and facts with the plaintiff herein.

Whereupon it is considered, ordered, adjudged and decreed by the court that the plaintiff, George A. Altgelt, suing by his next friend, George C. Altgelt, is entitled to the writ of mandamus prayed for and the defendant, San Antonio Traction Company, is hereby commanded to issue and sell to the said George A. Altgelt, for the sum of fifty cents (50c.) a lot of twenty one-half fare tickets, each good for one trip or ride over defendant's lines of street railway in the city of San Antonio to be used by him in attending said school for which the writ of mandamus may issue.

It is further ordered, adjudged and decreed by the court that plaintiff do have and recover of the defendant all costs of this suit for which execution may issue, to which ruling, orders, judgment and decree of the court, the defendant then and there in open court excepted and gave notice of appeal to the court of civil appeals of the fourth supreme judicial district of Texas, sitting at San Antonio. (Ent. vol. V. p. 519.)

17 Statement of Facts.

In District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, by Next Friend,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Be it remembered, that the following is a statement of the facts proved on the trial of the above numbered and styled cause:

GEORGE C. ALTGELT, witness for the plaintiff, testified as follows: My name is George C. Altgelt, I live in this city, in the northern portion of the city. Yes sir, in this county and State. I know George A. Altgelt, he is my son. He is between fourteen and fifteen years of age; he was born April 12th, 1889, fourteen years and six months. On the 19th day of September, 1903, I tried to secure a batch of tickets of the San Antonio Traction Company. I went to the office of the traction company on Houston street, this city. That is the principal office of the company that I know of; it is the joint office of the San Antonio Traction Company and the San Antonio Gas & Electric Light Company. About 12 or 15 feet back from the front door of the office there is a railing, and there are two windows there, one for the San Antonio Gas & Electric Light Company, and the other for the San Antonio Traction Company. I first went to the wrong window and a man told me to go to the next window, that it was the traction company's window, and I did. There was a young man there and I handed him that certificate (showing certificate) and told him, here is fifty cents for a package of 20 half-fare street car tickets. The species of money was silver coin, U. S. money. He said, we don't issue these tickets. No sir, I could not have gotten anybody else. Mr. Regan Houston came in while I was there with a package of papers and spoke to the bookkeeper in the office. I couldn't get to him, there is a railing eight feet high, and the door through was locked on the inside. George A. Altgelt went to Magruder's School for Boys. He began in September. School opened before I made this demand, he had been attending school possibly two weeks. George A. Altgelt lived at my home, my house is about two miles and a half from the school. The name of the school is Magruder's School for Boys. In going to school from my house, he would have to get on the car at River and Brackenridge avenues, down River avenue to Grand Ave.,
18 across Grand Ave. two blocks to Austin street, down Austin street one block, then west two blocks to Avenue C., then down Ave. C. as far as Fourth street, and then walk over six or seven blocks. The party to whom I spoke did not give any reason why he didn't issue these tickets, he said, we don't issue these tickets, he handed the certificate back to me and said we don't issue these

tickets. That is the certificate I offered to the man I found at that window.

Plaintiff offered in evidence the aforesaid certificate which reads as follows:

"THE STATE OF TEXAS, }
County of Bexar. }

In the City of San Antonio, Texas.

I, J. B. Magruder, principal of a private school in the city of San Antonio, Texas, known as Magruder's School for Boys, hereby certify that George A. Altgelt, is a regular scholar attendant on said school; that he is under the age of seventeen years, in regular attendance upon such school and is in a grade thereof not higher than the grade of the public high schools of this State situate within or adjacent to the city of San Antonio.

I further certify that the said Magruder's School for Boys and which the said George A. Altgelt so attends, is situated on Dallas street in said city of San Antonio, and that its regular sessions for the term of A. D. 1903–1904, began on the 7th day of September, A. D 1903, and ends on the first day of June A. D. 1904.

Witness my signature on this the 19th day of September, A. D. 1903.

(Sd.) J. D. MAGRUDER,
Principal Magruder School for Boys.

It is a private school, paid tuition, I would call it a grammar school. The studies of George A. Altgelt are strictly elementary, they are reading, writing, arithmetic, geography and spelling.

Cross-examination.

I do not know the name of the young man at the window of the traction company's office. I do not know what his business was. I knew Mr. Regan Houston's business, he was president of the company. I saw him there. I did not speak to him, I could not,
19 he was near enough to speak to him. I did not ask to speak to him nor ask the young man to see or speak to him for me. I knew he was president of the company. I do not know what position the young man held. He was in charge of the office. He was standing at the window, and just before I spoke to him, either a conductor or motorman came in and spoke to him; he came in from a car, walked in and transacted some business with him and walked out. I am not sure of the exact language as used by him and me, I can give you only the substance of it. I showed him this certificate and he read it; it seemed to be an entirely new thing to him; he said we don't issue these tickets. He said we don't issue 2½ cent tickets and he picked up a little yellow book and said this is the only ticket we issue; I put my fifty cents in my pocket and

walked out. I think he said 2½ cents tickets, at least I called for them; I called for twenty tickets at fifty cents, and he said we don't issue them. He took the certificate, I suppose he read it. He said this is the only tickets we issue taking a yellow book from a little pigeon hole near the window.

Redirect examination.

He didn't exactly offer other tickets; he said, these are the only tickets we issue, showing me a yellow book of tickets that looked like ice tickets. He didn't refer me to anybody.

Defendant offered in evidence the charter of the San Antonio Street Railway Company, being special act of the legislature of May 2nd. 1874, as follows:

An Act to Incorporate the San Antonio Street Railway Company.

"SECTION 1. Be it enacted by the legislature of the State of Texas, that J. H. Kampmann, H. B. Adams, Daniel Devine, E. D. L. Wickes, John Twohig, John Withers, and Peter Sheiner, of the city of San Antonio, county of Bexar, and their associates and successors, are hereby declared a body corporate and politic, under the name and style of the "San Antonio Street Railway Company." By which name they may contract and be contracted with; sue to final judgment and be sued; plead and be impleaded; issue bonds and borrow money for the construction, equipment and maintainance of their roads, buy and sell real and personal estate, and generally to do all acts necessary to carry out the objects and designs of said company.

SEC. 2. The legal domicile of said company shall be in the city of San Antonio.

SEC. 3. The object of said company is delared to be to build, equip, own and operate street railways in the streets of the city of San Antonio, and also, in such parts of Bexar county as may be continuations of said streets, or of said railroads; and this company, under this act, is authorized to build such roads on any street within the corporate limits of the city of San Antonio, as may hereafter be agreed upon by the mayor and alderman of the city of San Antonio, and the said "San Antonio City Street Railway Company," with the right to use such motive power as may be agreed upon between this company and the city council of San Antonio.

SEC. 4. The capital stock of this company shall be two hundred thousand dollars, divided into shares of twenty-five dollars each; said shares shall be transferrable on the books of the company in person or by attorney.

SEC. 5. Subscriptions for shares to the capital stock of this company shall be paid in such sums, and at such times as may be agreed upon by the by-laws of said company. When any stockholder shall make default in the payment of the assessment of his stock, it shall

be sold by the president of said company, after thirty days' public notice, published in some newspaper in the city of San Antonio, which sale shall be an absolute conveyance in fee simple of such stock to its purchaser, he also paying the remaining installments which may be due.

SEC. 6. This company shall, at their first meeting, make by-laws for its government, not inconsistent with the constitution and laws of this State, or this act of incorporation. No by-laws shall take effect until approved by a majority of the stock-holders.

SEC. 7. The parties named in the first section of this act or a majority of them, are hereby declared commissioners, whose duty it shall be, within twenty-four months after the passage of this act, to organize said company as may be determined by a majority of them. The stockholders shall elect a board of not less than five nor more than seven directors, who shall elect from their number a president; and they shall elect such other officers as the by-laws may require.

SEC. 8. That all contracts made or entered into by and be-
21 tween the mayor and alderman of the city of San Antonio and the said company, or any privileges or rights granted by the said mayor and alderman of the city of San Antonio to the said company shall be in all respects legal and binding on the aforesaid contracting parties.

SEC. 9. This charter shall remain in full force and effect for the period of fifty years.

SEC. 10. Be it further enacted, that all acts, laws, or parts of laws, ordinances or declarations conflicting with this act of incorporation be, and the same are hereby repealed; provided that nothing herein contained shall annul or set aside any ordinances or laws of the city council of the city of San Antonio.

SEC. 11. That this act shall take effect from and after its passage."

Defendant offered in evidence the ordinance of the city of San Antonio granting right-of-way to the San Antonio Street Railway Company within the corporation limits of the city of San Antonio, which is as follows:

"Be it ordained by the city council of the city of San Antonio

SEC. 1st. That the privileges is hereby granted to the San Antonio Street Railway Company to construct and run a first class horse railway, with its necessary side tracks, switches, turn-outs and turntables, and that the rights, privileges and franchises, are hereby granted to said railway company, for and during the term of the charter, upon the street, avenues, plazas, alleys and bridges of said city, or upon such portions of the same, in or upon which the said railway may be completed within five (5) years from and after the passage of this ordinance; from the Alamo plaza in the city of San Antonio to the neighborhood of San Pedro springs, and upon such streets and avenues and plazas of San Antonio as may be suitable for the construction and use of a horse railway, whenever the interests of said railway company, or the public may require it.

SEC. 2. That in constructing the road bed of said railway upon

any street or plaza within the present, or future limits of San Antonio, the said railway company, shall conform, to the grade of the streets of the city of San Antonio, through which said railway may be constructed. The grade of said streets, avenues and plazas to be determined by the city engineer, under the direction of the
22 city council; and in the construction of any road-bed, upon any street, avenue or plaza, said work to be done under the supervision of the improvement committee appointed by the city council, and all streets, avenues and plazas and crossings of streets, or avenues shall remain in as good condition after said road-bed is put down, as before the construction of said road-bed.

SEC. 3. That said company shall so construct and keep in a good condition the road running through any of the streets, avenues or plazas within the corporate limits of the city of San Antonio, so as not to interfere with or obstruct the passage of the vehicles, or travel of pedestrians, and nothing in this ordinance shall be construed into the granting permission to said company to construct any road-way, or turn-table on Commerce street, the same being expressly and excepted out of the permission herein granted.

SEC. 4. That said company is hereby required to observe and abide by all ordinances now or hereafter existing, of the city of San Antonio, not inconsistent with the rights herein granted; and pay such taxes as may be properly assessed against them.

SEC. 5. That any person wilfully obstructing the cars of said company or railroad-bed or other fixtures of said company, shall be fined not less than ten nor more than one hundred dollars, to be recovered before the recorder of the city.

SEC. 6. That this ordinance take effect and be in force from and after its passage."

Said ordinance is dated Oct. 5th, 1875.

Defendant then offered in evidence, ordinance of the city of San Antonio granting an extension of time and fixing the date at which the rights, privileges and franchises of the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company shall expire, and imposing conditions and limitations upon the exercise of said rights, privileges and franchises, dated March 16th, 1899.

Be it ordained by the city council of the city of San Antonio, that:

"4th. Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails and all the space between the double tracks, and twelve (12) inches on the outside of their tracks on any street occupied by them or either
23 of them which shall hereafter by paved by the city, as and when the city paves, and with the same material as used by the city, and shall keep the same in reasonable repair and in like condition as the city keeps adjoining streets.

That said street railway companies shall charge five cents fare for

one continuous ride over any one of their lines, with one transfer to or from either line to the other.

SECTION II. The rights, privileges and franchises, or either of them herein referred to and hereby extended may be assigned by the grantee or grantees to any person or corporations and limitations of this ordinance shall apply to the assignee thereof.

SECTION IV. Said company or either of them or their assigns shall file with the city clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this ordinance, otherwise this ordinance shall have no force or effect.

SECTION V. Said companies shall be subject to all ordinances of this city except in so far as such ordinances conflict herewith."

Defendant then offered in evidence conveyance by Thomas Johnson, receiver appointed by this court, bearing date 4th day of April, 1900, to W. F. Douthirt, trustee for the stockholders of said company and his assigns, "all of the estates, property, rights, privileges, accounts, claims and choses in action, being all of the property of every kind and nature whatsoever, heretofore belonging to the San Antonio Street Railway Company, and now in the hands of this receiver, subject however, and charged with the payment of all debts, claims and demands, liquidated or unliquidated, which have been or may hereafter be established against the said San Antonio Street Railway Company and subject to and charged with the performance of all of the outstanding contract obligations of said San Antonio Street Railway Company, and all said debts, claims and demands, liquidated or unliquidated, that may be hereafter established as liabilities of said corporation, and all contracts and obligations of said corporation shall be and remain forever a preference lien against all the property and estates so sold by this receiver, whether in the hands of the purchaser or his assigns, superior and paramount to any liens or obligations that may be hereafter fixed or created by said purchaser or his assigns.

24 Within the meaning of the words, contract obligations, shall be understood any and all valid existing contracts of the said San Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons now binding on said street railway company."

and the order of this court confirming said sale.

Also transfers from W. F. Douthirt, trustee, to The San Antonio Traction Company, the defendant herein, bearing date the 4th day of April, 1900, of all the property, real and personal, including machinery, equipment lines, rolling stock, privileges, accounts, notes, and every kind and character of assets and estates, conveyed to him by deeds and conveyances from Thomas Johnson, receiver of the San Antonio Street Railway Company, subject to all the limitations and charges referred to in said deeds and in the decree of the court entered in cause No. 9432, in the 37th. district court of Bexar county, Texas, on April 3rd, 1900.

Defendant offered in evidence an ordinance of the city of San Antonio, confirming to the San Antonio Traction Company and the San Antonio Gas & Electric Company, all the rights and privileges and subject to all of the limitations, duties and obligations heretofore conferred and imposed upon the San Antonio Street Railway Company, the San Antonio Edison Company, the San Antonio Gas Company and the Mutual Electric Light Company respectively dated August 7th, 1900, as follows:

"Whereas, under orders of sale made and confirmed by the district court of the 37th. district of Bexar county, Texas, and conveyances down to them the San Antonio Traction Company acquired and became the owner of all property, estates, rights and privileges of the San Antonio Street Railway Company and San Antonio Edison Company, and

Whereas, in the grants of rights and privileges to said four companies now defunct, limitations and duties valuable to the city and to the public were imposed which should be observed and performed by their successor companies, and

Whereas, the title to said franchises have been questioned by an opinion of the city attorney, and the good faith and credit of the city demand that it shall fulfill its obligations entered into between it and the said companies therefore,

Be it ordained by the city council of the city of San
25 Antonio,

SECTION 1. That all of the rights and privileges heretofore granted by the city of San Antonio to the San Antonio Street Railway Company and to the San Antonio Edison Company, be, and the same are hereby confirmed unto the said San Antonio Traction Company; and all of the limitations, duties, contracts and obligations imposed upon and required of said San Antonio Street Railway Company and said San Antonio Edison Company by the aforesaid ordinance of March 16th, 1899, or any other valuable ordinance in force at the time of the acquisition of the property of said two companies by the San Antonio Traction Company shall be, and the same are hereby imposed upon and required of said San Antonio Traction Company; and the said traction company shall within three days from the passage of this ordinance file with the city clerk its written acceptance of the terms hereof."

Also conveyance from the Grand Avenue Railroad Company to the San Antonio Traction Company, dated February 20th, 1901, conveying all of the ties, rails, spikes, fastening-, wire, poles, and material of every kind and character, owned by this company and constituting the street railway line from the head of the river and the Alamo Heights addition or suburb to the city of San Antonio; thence through said addition or suburb to River avenue, thence along River avenue to Grand avenue,—thence via Grand avenue to the junction of Austin street and Grand avenue. Also all the electrical machinery owned by this company and formerly owned by the Alamo Heights Railroad Company now situated in the power

house of the San Antonio Gas & Electric Company. Also all rolling stock and equipment owned by this grantor and formerly the property of the Alamo Heights Railroad Company.

It is not intended by this conveyance to transfer, sell or assign the old power house formerly owned by the Alamo Heights Railroad Company situated near the head of the river, nor the boilers or other machinery not connected with the rolling stock which is therein situated.

Defendant then offered in evidence the ordinance of the city of San Antonio, dated January 7th, 1901, granting to the San Antonio Traction Company, the right-of-way over Grand and River avenues and other streets of which the following is a copy:

"Be it resolved by the city council of the city of San Antonio.

26 SECTION 1. That the privilege be and is hereby granted to the San Antonio Traction Company to construct, own and operate its lines of street railway, with the necessary tracks, side-tracks, switches, turn-outs, curves, poles and wires, beginning at the intersection of Grand avenue and Avenue "C," connecting with the traction company's tracks on Austin street, thence along Grand avenue to River avenue,—thence along River avenue to the head of the river and to the Alamo Heights suburb to the city of San Antonio.

SECTION II. The rights, privileges and franchises granted by this ordinance are subject to all the limitations and duties imposed by ordinances of the city of San Antonio and by the ordinance granting a franchise and right to the said San Antonio Traction Company over other streets in the city of San Antonio and is for the term of the franchise for which the said San Antonio Traction Company now has and enjoys the privileges for its principal lines heretofore constructed and now owned and operated by it within said city.

SECTION III. That there be transfers given on the lines here granted to all lines over the city owned by the San Antonio Traction Company and connecting therewith.

SECTION IV. That this ordinance take effect and be in force from and after its passage.

It is admitted by plaintiff's attorneys that all these ordinances were accepted in due form by the traction company.

Mr. REGAN HOUSTON, a witness for the defendant testified as follows:

My name is Regan Houston. I was president of the traction company on the 19th, of September. There are a number of clerks in the office and as the requirements of business present themselves they attend to the different matters; usually this window is in charge of the cashier, Mr. Woodman. I do not know who was at the window at the time Mr. Altgelt called there. I never saw Mr. Altgelt in the house. I learned Mr. Altgelt had been there by a service to show cause in a mandamus suit, that was the first I heard of it. I know Mr. Altgelt very well. I have known him forty

years. I had a telephone in my office. I have often talked with him in his office over the telephone. Mr. Altgelt never applied to me for the purchase of school children's tickets at any time. He did not. I know he did not apply to any officer or agent of the company who was authorized to sell or refuse to sell tickets.

27 Cross-examination:

That window which has the traction company's name over it is in charge of the cashier, Mr. Woodman. He is authorized to receive money, he receives money from the conductors, he makes reports of them, he issues five cent tickets. He has no authority to receive money generally for the company. Those matters are handled by the auditor Mr. Thomas. I presume I would recognize the cashier's receipts: condemned property is turned over to the auditor. I was in my office on the 19th of September. I don't remember seeing you (Mr. Altgelt). I am selling school tickets now. I have been unable to decide what that law does call for. I will sell twenty tickets for fifty cents to you. I would always have sold school tickets to you. I am not trading with the public. Had the matter come to me I would have issued you 20 or 50 or 100 tickets rather than have any words with you about it. As to issuing tickets in compliance with the law; I don't understand the law. The tickets sold you would not contain any limitations, they would be five cent tickets rather than have any quarrel about it. I never had any occasion to sell you any tickets.

Q. I now tender you fifty cents and the certificate from Prof. Magruder; will you sell me tickets under this law?

A. No.

I have school tickets, they are good for the month and those that are not used are redeemed in cash. They are a book for any day at all, they are not limited. There are forty-six tickets in a book. I offer to sell you five cents tickets and not limited. I never refused to sell that class of tickets to others at that price. They were never demanded. I would have treated the individual as I pleased; as an officer of this company I would use my discretion. Mr. Woodman was not athorized to sell these tickets. He was not the man you spoke to, he is an older man. Whoever attends this window has no authority at all only such instructions as he gets from Mr. Woodman. He was not authorized at all; his authority I think is under Mr. Woodman. I never gave him any instructions. The tickets which were on sale at that window were in the desk and of a buff color. Yes sir, I have no doubt the young man that takes Mr. Woodman's place has authority to sell those tickets; no doubt Mr. Woodman gave him authority, at five cents a book or to give them away, we have used them often and generally have used five cent tickets for the purpose, and also because until
28 recently we have had no other; we gave them in lieu of passes for base ball games. Policeman never use those, they

ride on their uniform- and badges. As to knowing you forty years, I think so, it seems a long time. You were quite a likely boy when I first knew you.

W. R. MATEER, JR., witness for defendant, testified as follows: My name is W. R. Mateer, Jr., I am clerk in the traction company office. I remember the time this gentleman here (referring to Mr. George C. Altgelt) came to the office. One after-noon he came in with that certificate or rather statement, saying that his child was attending school at Magruder's and he desired half fare tickets; I told him I had no authority to sell any tickets, all I could sell was five cent tickets; he afterwards tendered me fifty cents for tickets, and I told him I couldn't do it, he would have to see Mr. Houston. When I told him he would have to see Mr. Houston he turned around and walked out. I am working directly under Mr. Woodman, as I am a clerk in the cashier's office.

Cross-examination.

The company generally sells tickets at the cashier's office. That was the window at which I was that day. I sell five cents tickets for the company. I told you I couldn't sell you any 2½ cent tickets. I can't answer as to whether there were any in the house at that time, I don't know what Mr. Houston had. I did not have any at that time. I don't know when I saw those tickets; a day or two afterwards I think. Some days after you were there. In selling those tickets now they have to go to the secretary. The cashier receives the money for the book. When the cashier is not there I do it. But at that time I didn't have them. I referred this matter to Mr. Woodman and Mr. Woodman took it up with Mr. Houston I think. Mr. Houston was in the back office. I didn't speak to Mr. Houston, I told you, you could see Mr. Houston; you could get Mr. Houston around by the main office, that door is not locked, it is open all the time. I did not tell you where to go. I am positive I told you to see Mr. Houston. I am positive I didn't have the tickets at that time, not until a few days after. They are not in the window, I sell them to those that apply for them. As to your going first to the other window, I didn't see you until you came to me.

29 We hereby agree that the above and foregoing nine pages contain a true statement of the facts proved upon the trial of this case.

AUG. E. ALTGELT,
Attorney for Plaintiff.
HOUSTON BROS.,
Attorneys for Defendant.

Approved:
JOHN H. CLARK, Judge.

Filed Nov. 11, 1903.

GEORGE SURKEY,
Clerk District Court, Bexar County, Texas,
By F. L. RILEY, Deputy.

Defendant's Bill of Exception No. 1.

In the District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, by Next Friend,
vs.
THE SAN ANTONIO TRACTION CO. } No. 14906.

Defendant's Bill of Exception No. 1.

Be it remembered that upon a trial of the above entitled cause, plaintiff offered in evidence the certificate of J. B. Magruder, principal of Magruder's School for Boys, of which the following is a copy, to-wit:

"THE STATE OF TEXAS,
County of Bexar.

In the City of San Antonio, Texas.

I, J. B. Magruder, principal of a private school in the city of San Antonio, Texas, known as Magruder's School for Boys, hereby certify that George A. Altgelt, is a regular scholar attendant on said school; that he is under the age of seventeen years, in regular attendance upon such school and is in a grade thereof not higher than the grades of the public high schools of this State situate within or adjacent to the city of San Antonio.

I further certify that the said Magruder's School for Boys and which the said George A. Altgelt so attends, is situate on Dallas street in said city of San Antonio, and that its regular session for the term of A. D. 1903–1904 began on the 7th day of September A. D. 1903, and ends on the 1st day of June A. D. 1903.

Witness my signature on this the 19th day of September, A. D. 1903.

(S'd) J. B. MAGRUDER,
Principal Magruder's School for Boys."

To the introduction of which said certificate defendant objected, because the same does not show that Magruder's School for Boys is an academic public or private school and because the said certificate does not show that the said Magruder's School for Boys has no grades in it higher than the grades of the public high schools of this State and because it is not shown that defendant knew or was notified in any way that said school was of such character as described in the statute, which said objections were overruled by the court and the said certificate admitted in evidence, to which action and ruling of the court, defendant then and there in open court excepted and tenders this its bill of exceptions No. 1, and asks that same be signed,

filed and made a part of the record herein, which is accordingly done.

JOHN H. CLARK, Judge.

Filed November 11, 1903.

GEORGE SURKEY,
District Clerk, Bexar County, Texas,
By F. L. RILEY, Deputy.

Defendant's Bill of Exceptions No. 2.

In District Court, 37th Judicial District, Bexar County, Texas.

GEO. A. ALTGELT, by Next Friend,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Defendant's Bill of Exception- No. 2.

Be it remembered that upon the trial of the above entitled cause the following proceedings were had:

While plaintiff's witness George C. Altgelt was testifying for plaintiff on direct examination, plaintiff's counsel asked the witness the following question:

"Q. Do you know of what—know what kind of school, what grade, what class of school, what it would be called?" to which question the defendant objected, because there is no allegation in the petition herein that the defendant knew or was notified in any way that the school which Geo. A. Altgelt attended was of such character
31 as described in the statute. Whereupon plaintiff's counsel asked the witness the following questions and the witness was thereupon permitted to testify as follows, over the objections of defendant as hereinbefore set out duly urged to each of said questions and answers and the court's action in admitting said evidence excepted to at the time:

Q. "Is it a private or public school?
A. Private school, paid tuition.
Q. Do you know about the branches taught there?
A. I would call it a grammar school.
Q. Do you know about the studies your boy has there?
—. ——.
Q. I will ask the witness if he is acquainted with the studies of George A. Altgelt, and what they are?
A. Yes sir.
Q. What are those studies?
A. They are strictly elementary.
Q. Could you name those studies?
A. Yes.

Q. I will ask you to name them?
A. Reading, writing, arithmetic, geography and spelling.
Q. State if you know, if he is in about the same grade boys of his age generally are?"

To which actions and rulings of the court in admitting the testimony hereinbefore set out over the objections hereinbefore stated and urged to all of said testimony, defendant's counsel duly excepted and tenders this its bill of exceptions No. 2, and asks that the same be signed, filed and made a part of the record herein, which is accordingly done.

JOHN H. CLARK, Judge.

Filed November 11, 1903.

GEORGE SURKEY,
District Clerk, Bexar County, Texas,
By F. L. RILEY, Deputy.

Order Allowing 20 Days for Filing Statement of Facts.

In District Court, 37th Judicial District, Bexar County, Texas.

THURSDAY, October 29th, A. D. 1903.

GEORGE A. ALTGELT, Suing Herein by Next Friend, Geo. C. Altgelt,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

32 It is hereby ordered by the court that twenty days after the adjournment of this term of court is granted and allowed in which to prepare the statement of facts and bills of exceptions herein. (Vol. V. 519.)

Order Fixing Supersedeas Bond.

In District Court, 37th Judicial District, Bexar County, Texas.

THURSDAY, Oct. 29, 1903.

GEORGE A. ALTGELT, Suing Herein by Next Friend, Geo. C. Altgelt,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Whereas the defendant herein has given notice of appeal from the decree awarding the writ of mandamus herein is desirous of superseding the execution of the judgment and issuance of said writ pending said appeal and has requested the court to fix the amount of

such supersedeas bond and the court has fixed such bond at the sum of one hundred dollars ($100.00).

Therefore it is ordered that upon the filing of said supersedeas bond in the sum of one hundred dollars ($100.00) payable to Geo. A. Altgelt within the time prescribed by law, the judgment shall be supeseded herein and no writ shall issue pending said appeal.

Appeal Bond.

In District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, Suing Herein by Next Friend, Geo. C. Altgelt,
vs.
SAN ANTONIO TRACTION CO. } No. 14906.

Whereas in the above numbered and entitled cause, pending in the district court, 37th judicial district, Bexar county, Texas, and at a regular term of said court, to-wit: on the 29th day of October 1903, the said George A. Altgelt, recovered judgment against the San Antonio Traction Company, decreeing the issuance of writ of mandamus to defendant San Antonio Traction Company to issue and sell to the said George A. Altgelt, for the sum of fifty cents, a lot of twenty one-half tickets, each good for one trip or ride over defendant's lines of street railway in the city of San Antonio, and all costs of suit from which judgment the said San Antonio Traction Company has taken an appeal to our court of civil appeals for the
33 4th supreme judicial district at San Antonio, Texas, in the county of Bexar.

Now therefore, we, San Antonio Traction Company, as principal, and A. W. Houston and Regan Houston as sureties, acknowledge ourselves bound to pay George A. Altgelt and George C. Altgelt, the sum of two hundred ($200.00) conditioned that the said San Antonio Traction Company appellant, shall prosecute its appeal with effect, and shall pay all costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court.

Witness our hands this 18th day of November A. D. 1903.

SAN ANTONIO TRACTION COMPANY,
By HOUSTON BROS., Att'ys.
A. W. HOUSTON,
REGAN HOUSTON.

I have fixed the probable amount of the costs of the suit in the court of civil appeals, the supreme court and the court below at two hundred ($200.00) dollars, and approve the foregoing bond this 18th day of November, 1903.

GEORGE SURKEY,
Clerk 37th District Court, Bexar County,
By F. L. RILEY, Deputy.

Filed, November 18, 1903.

GEORGE SURKEY,
District Clerk, Bexar County, Texas,
By F. L. RILEY, Deputy.

Supersedeas Bond.

In District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, Suing Herein by Next Friend, Geo. C. Altgelt,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Whereas on the 29th day of October, 1903, at a regular term of court, George A. Altgelt, plaintiff herein, suing by his next friend George C. Altgelt, recovered judgment against the defendant San Antonio Traction Company, decreeing the issuance of writ of mandamus to defendant San Antonio Traction Company to issue and sell to the said George A. Altgelt for the sum of fifty cents, a lot of twenty one-half fare tickets, each good for one trip or ride over defendant's lines of street railway in the city of San Antonio,
34 from which judgment and order, defendant San Antonio Traction Company, desires to take an appeal to the court of civil appeals of the 4th supreme judicial district of Texas, and desires to supersede the execution of said judgment pending said appeal, and

Whereas, the district court of the 37th judicial district, before whom this case was tried, by an order entered in the minutes thereof, has fixed the amount of said supersedeas bond at sum of one hundred dollars.

Therefore, know all men by these presents, that we, San Antonio Traction Company, appellant, as principal and A. W. Houston and Regan Houston, as sureties, are held and legally bound by these presents to pay unto George A. Altgelt, appellee, the sum of one hundred dollars ($100.00).

Conditioned, that appellant shall prosecute its appeal with effect and in case the judgment of the supreme court or court of civil appeals shall be against it, it shall perform its judgment, sentence or decree and pay all such damages as said court may award against it.

Witness our hands this 18th day of November, A. D. 1903.

SAN ANTONIO TRACTION COMPANY,
By HOUSTON BROS., Att'ys.
A. W. HOUSTON,
REAGAN HOUSTON.

Filed and approved this 18th day of November, 1903.

GEORGE SURKEY,
District Clerk, Bexar County,
By F. L. RILEY, Deputy.

Filed Nov. 18th, 1903.

GEO. SURKEY,
Cl'k D. C., Bexar County, Texas,
By F. L. RILEY, Deputy.

Appellant's Assignments of Error.

In District Court, 37th Judicial District, Bexar County, Texas.

GEORGE A. ALTGELT, by Next Friend,
vs.
SAN ANTONIO TRACTION COMPANY. } No. 14906.

Now comes appellant, San Antonio Traction Company and makes the following assignments of error committed by the trial court upon the trial of this case, for which it asks that the judgment herein be reversed and judgment rendered in its favor, or
35 this cause remanded for another trial.

First.

The trial court erred in overruling defendant's general demurrer to plaintiff's original petition, because the same is insufficient in law to entitle the plaintiff to have and maintain his suit in manner and form as charged.

Second.

The trial court erred in overruling defendant's first special exception because it does not appear from said petition that plaintiff is without remedy at law for any wrongs alleged in said petition.

Third.

The trial court erred in overruling defendant's second special exception, because it does not appear from said petition that plaintiff has a clear legal right prescribed by law and that plaintiff's allegations are not sufficiently specific to put defendant upon notice, only alleging as they do, the conclusion of the pleader and do not allege any specific or definite provisions of the law showing a clear legal duty upon the part of defendant and a right upon the part of plaintiff.

Fourth.

The trial court erred in overruling defendant's third special exception, because it does not appear from said petition whether plain-

tiff is invoking a statute of the State, an ordinance of the city or provision of defendant's franchise or charter and said allegations of plaintiff's legal right and defendant's legal duty are too vague, indefinite and uncertain to require defendant to answer herein.

Fifth.

The trial court erred in overruling defendant's fourth special exception, because it does not appear from said petition that plaintiff or anyone for him applied to any officer or agent of defendant for the tickets in question or to what officer or agent he made application.

Sixth.

The trial court erred in overruling defendant's fifth special exception, because it does not appear from said pleading that plaintiff is entitled to any right by reason of his attendance upon "Magruder's school for boys."

36

Seventh.

The trial court erred in overruling defendant's sixth special exception, because if this proceeding be based upon chapter CXVI, of the General Laws of the 28th, Legislature of Texas, entitled:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act."

Then this defendant specially excepts to this action, because said act of the legislature is unconstitutional and void as to this defendant, in that it is in violation of section 7, of article 10, of the constitution of this State, in that by it the legistature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the constitution.

Eight.

The trial court erred in overruling defendant's seventh special exception, because said act of the legislature is unconstitutional because the same contains more than one subject and because the subject of said act is not expressed in its title as required by section 35, article 3, of the constitution of Texas.

Ninth.

The trial court erred in overruling defendant's eighth special exception, because said act is in violation of the constitution of this State, because it is local and special legislation and was not passed in accordance with constitutional requirements for legislation of that character.

Tenth.

The trial court erred in overruling defendant's ninth special exception, because said act is unconstitutional because it is class legislation in that it imposes burdens upon certain persons, including this defendant, while permitting special privileges to others of the same class and business.

Eleventh.

37 The trial court erred in overruling defendant's tenth special exception, because said act is unconstitutional and void as to this defendant, because its enforcement is calculated to and will deprive this defendant of its revenues and property without compensation and without due process of law.

Twelfth.

The trial court erred in overruling defendant's tenth special exception, because said act of the legislature is in violation of section 10 of article 1 of the Constitution of the United States and of section 16 of article 1, of the constitution of Texas and in violation of section 1, of the fourteenth amendment to the Constitution of the United States and of section 17 of article 1 of the constitution of Texas, because said act impairs the obligation of the valid and subsisting contract existing between this defendant and the city of San Antonio and deprives this defendant of its property without due process of law and without compensation therefor.

Thirteenth.

The trial court erred in admitting in evidence over defendant's objection, the certificate of J. B. Magruder as shown by defendant's bill of exception No. 1.

Fourteenth.

The court erred in admitting in evidence the testimony of plaintiff's witness, George C. Altgelt, as shown by defendant's bill of exceptions No. 2.

Fifteenth.

The court erred in finding for the plaintiff and in granting a writ of peremptory mandamus herein, because the evidence in the case shows that plaintiff was not entitled to said writ and that defendant was entitled to a judgment herein.

Sixteenth.

The court erred in finding in favor of plaintiff and in granting said writ and in not finding in favor of defendant and in not refusing said writ, because the evidence shows without dispute;

1st. That the San Antonio Street Railway Company was incorporated by special act of the legislature of Texas, May 2nd, 1874, in which it is provided: "Sec. 8. That all contracts made or entered into between the mayor and alderman of the city of San Antonio and the said company, or any privileges or rights granted by
38 the said mayor and alderman of the city of San Antonio to the said company, shall be in all respects legal and binding on the aforesaid contracting parties. Sec. 9. This charter shall remain in full force and effect for the period of fifty years."

2nd. On October 5th, 1875, the city of San Antonio by ordinance granted right-of-way &c., to said company by ordinance, but did not in said ordinance fix the rate of fares which might be charged and did not require the paving of any portion of the streets occupied by its track and did not provide for transfer.

3rd. On the 16th, of March 1899, the city, by ordinance extended the time for which the franchise of said company should exist and as a condition thereof, provided that thereafter said company should charge 5 cts. fare for each passenger, should grant transfer from one line to another and should do certain paving and improvement of the streets which ordinance was accepted and agreed to by the company.

4th. The San Antonio Traction Company through judicial sale of 4th, day of April, 1900, and conveyances thereunder, because the successor and owner of all the rights of the San Antonio Street Railway Company and subject to all the duties and liabilities of the city's grants to it, which were granted and confirmed to the said San Antonio Traction Company by ordinance of said city on the 7th, day of August, 1900. All of said ordinances were accepted in due form by said company. Which facts establish a contract valid and binding between the city of San Antonio and the San Antonio Traction Company by the terms of which the said traction company had the right to charge 5 cts. fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other, which contract cannot be impaired by legislative enactment by the State or ordinance by the city and the act of the legislature of Texas being an act entitled,

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act.

39 SECTION 1. Be it enacted by the legislature of the State of Texas; All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry chil-

dren of the age of twelve years or less at and for one-half the charge or charge regularly collected by such person or corporation for the transportation of adult persons; provided that this act shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run.

SECTION 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons to students not more than seventeen years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.

SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge.

SEC. 4. All such persons or corporations are required to accord to all passengers referred to in sections 1, 2, and 3 of this act the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.

SECTION 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty-five or more than one hundred dollars.

SECTION 6. Any person who shall misrepr ent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.

SECTION 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended."

and specially the second section of said act wherein it is provided:

"All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grade not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of a written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon said school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets".

Is in contravention of sec. 16 of art. 1, and of sections 17 and 19 of art. 1, of the constitution of Texas and of section 10 art. 1, and of sec. 1 of the 14th. amendment to the Constitution of the
41 United States, in that it impairs the obligation of said valid and subsisting contract between the city of San Antonio and the San Antonio Traction Company and deprives said company of its property and revenues without due process of law and without compensation and denies to said company the equal protection of the law and is therefore as to this appellant, the San Antonio Traction Company, unconstitional and void.

Seventeenth.

The court erred in granting the writ of mandamus prayed for because the statute, chapter CXVI being entitled an act requiring all persons or corporation- owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act, passed by the 28th, legislature of Texas, is unconstitutional as to this defendant, in that it is in contravention of sec. 16 of article 1 of the constitution of Texas and of section 10 art. 1 of the Constitution of the United States in this that the said act impaired the valid and subsisting contract between the city of San Antonio and this defendant by which and under the ordinances of the city of San Antonio, this defendant has the right to charge 5 cents fare for passage over its lines.

Eighteenth.

The court erred in finding for plaintiff and in granting a writ of mandamus herein, because the act of the legislature, viz., An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants, to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act, under which the court acted in granting said writ is in contravention of sec-. 17 and 19 of art. 1, of the constitution of Texas, of section 1 of the XIV amendment to the Constitution of the United States, in that it deprives this de-
42 fendant of its property without due process of law and without compensation and denies to this defendant the equal protection of the laws of the land.

Nineteenth.

The court erred in holding that the city of San Antonio had no right to fix by ordinance granting the defendant the right to operate in San Antonio, the rates of fare which defendant could charge itpassengers and in holding that the city could not make a binding contract fixing such limitations as it might deem best, upon its consent to defendant to operate in the streets of the city of San Antonio.

Twentieth.

The court erred in holding that the State had the right reserved to it to fix the rates of fare on defendant's lines and the right to change rates of fare fixed by the city of San Antonio.

HOUSTON BROS.,
Attorneys for San Antonio Traction
Co., Def't & Appellant.

Filed, Dec. 30, 1903.

GEORGE SURKEY,
Cl'k D. C., Bexar County, Texas,
By F. L. RILEY, Deputy.

Bill of Costs.

Clerk's Fees.

Docketing	$ .20
Citations, copies & return	1.75
Filing papers	1.50
Entering appearances	.15
" orders	2.25
" judgments	1.00

Swearing witnesses	.40
Taxing costs	.25
Transcript	26.00
Total	$33.50

Sheriff's Fees.

Executing writs	$ .75
Jury fees	.50
Total	$1.25

Recapitulation.

Clerk's fees	$33.50
Sheriff's fees	1.25
Stenographer's fees	8.65
Total	$43.40

43 Clerk's Certificate.

THE STATE OF TEXAS, }
Bexar County. }

I, George Surkey, clerk of the district courts of Bexar county do hereby certify that the foregoing fifty-one (51) pages contain a true and correct transcript of the orders and proceedings had in a cause on the civil docket of the district court of the thirty-seventh judicial district numbered No. 14906 wherein George A. Altgelt, by next friend George C. Altgelt is plaintiff and the San Antonio Traction Company is defendant.

Witness my hand and seal of said courts at office in the city of San Antonio this the 9th day of January, A. D. 1904.

GEORGE SURKEY,
Cl'k D. C., Bexar County, Texas,
[SEAL.] By F. L. RILEY, Deputy.

Endorsements: No. 3003, San Antonio Traction Co., appellant, *vs.* Geo. A. Altgelt, appellee. From the district court of Bexar county, 37th judicial district of Texas, applied for by Houston Bros., on the 18th day of Nov., 1903, and delivered to Houston Bros., on the 9th day of January, 1904,. Geo. Surkey, clerk, district courts, Bexar county, by F. L. Riley, deputy. Filed in the court of civil appeals for the fourth supreme judicial district of Texas, at San Antonio, the 13th day of February, 1904. H. E. Hildebrand, clerk.

44 Opinion of Court of Civil Appeals.

Appeal from the District Court of Bexar County.

SAN ANTONIO TRACTION CO., Appellant,
vs.
GEO. A. ALTGELT, Appellee. } No. 3003.

This is an appeal from a judgment awarding the appellee a mandamus compelling the appellant to issue and sell to him for 50 cents twenty half-fare street car tickets, each good for one trip over its lines of street railway in the city of San Antonio, to be used by appellee as a student in attending school.

The evidence shows that the San Antonio Traction Company owns and operates a system of street railways in and upon the public streets of the city of San Antonio, Texas, a city of not less than 40,000 inhabitants, and so operated such system of railways on the 22nd day of September, 1903; that on said date appellee, George A. Altgelt, a boy fourteen years old and a student in actual attendance upon Magruder's School for Boys, maintained in said city, in which the grades are not higher than the grades of the public high schools of Texas, within or adjacent to said city, through his father, George C. Altgelt, presented to appellant at its office in San Antonio, a written certificate of J. B. Magruder, principal of said school, showing that he was not more than seventeen years of age, and was in regular attendance upon such school, and within grades not higher than those of the public schools of the State within or adjacent to the city, at the same time and place tendering appellant's agent there, who had ap-arent authority to issue and sell tickets, 50 cents and applied for the issuance to him therefor, as a student in such school a lot of twenty tickets, each good for one trip over the lines of railway owned and operated by appellant in said city, which is one-half the regular fare or charge collected for the transportation of adult persons over the company's lines of railway; that appellant's agent, upon such application and demand, refused to sell or issue to appellee such tickets.

These facts, under the act of April 10, 1903, of the 28th legislature, p. 182, entitle the appellee to a writ of mandamus requiring the company to issue such tickets and to an affirmance of the judgment of the court below awarding such writ, unless the matters plead and proven by appellant show that the provisions of said act cannot under the constitution of this State or of the United States, be enforced against the San Antonio Traction Company.

45 The facts so plead and proven are as follows:

1. The San Antonio Street Railway Company was incorporated May 2nd, 1874, by the special act of the legislature of Texas. By sec. 8 of the act of incorporation it is provided "that all contracts made or entered into between the mayor and aldermen of the

city of San Antonio and said company, or any privileges or rights granted by said mayor and aldermen of the city of San Antonio to said company, shall be in all respects legal and binding on the aforesaid contracting parties," and by section 9 it is provided that said charter shall remain in full force and effect for a period of fifty years.

2. By an ordinance of the city council of the city of San Antonio, passed Oct. 5th, 1875, the privilege was granted to the San Antonio Street Ry. Co. to construct and run a first class horse railway and its necessary side tracks, switches, etc., for and during the term of its charter, upon the streets, avenues, etc. of said city, or such portion of the same in or upon which its railway might be completed within five years from and after the passage of said ordinance, from Alamo plaza in said city to the neigborhood of San Pedro springs, and upon such streets and avenues and plazas of San Antonio as might be suitable for the construction and use of a horse railway wherever the interest of said railway company or the public might require it. This ordinance did not fix the rate of the fare to be charged for transportation of persons by said company over its projected lines or railway.

3. On March 16th, 1899, an ordinance of the city of San Antonio was passed granting an extension of time and fixing the date at which the rights, privileges and franchises of the San Antonio Gas Co., Mutual Electric Light Co., San Antonio Street Railway Co., and the San Antonio Edison Co. should expire, and imposed certain conditions and limitations upon the exercise of such rights, privileges and franchises of said companies. Among which was "that said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other." It was also provided by sec. 11 of said ordinance that "the rights, privileges and franchises, or either of them herein referred to and hereby extended may be assigned by the grantee or grantees to any person or corporation, and the limitations of this ordinance shall apply to the assignee thereof."

4. On the 4th day of April, 1900, Thomas Johnson, as receiver, appointed by the district court of the 37th judicial district
46 under a decree of said court sold and conveyed to W. F. Douthirt, as trustee for the stockholders of the San Antonio Street Railway Co., "all of the estates, property, rights, privileges, etc. being all the property of every kind and nature whatever theretofore belonging to the San Antonio Street Ry. Co. then in the hands of said receiver, subject however and charged with the payment of all debts, claims, etc. which had been and might thereafter be established against said street Ry. Co. and subject to and charged with the performance of all outstanding contracts obligations, etc. of said company, and that all contracts obligations of said corporation should be and remain a preference lien against all the property and estates so sold by said receiver, whether in the hands of the purchaser or his assigns, superior and paramount to any liens or obligations that might be thereafter fixed or created by such purchaser or his as-

signs." The conveyance expressly stipulates that " within the meaning of the words 'contract obligations,' shall be understood any and all valid existing contracts of the said San Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons now binding on said street railway company.

5. On the 4th day of April, 1900, W. F. Douthirt, as trustee, conveyed to appellant, The San Antonio Traction Company, all the property, real and personal, including machinery, equipment lines, rolling stock, privileges, accounts, notes and every kind and character of assets and estates conveyed to him by Thos. Johnson, receiver of the San Antonio Street Ry. Co. " subject to all the limitations and charges referred to in said deeds and in the decree of the court entered in cause No. 9432 in the 37th district court of Bexar county, Texas, on April 3d, 1900."

6. On August 7th, 1900, the common council of the city of San Antonio passed and enacted the following ordinance:

" Whereas, under orders of sale made and confirmed by the district court of the 37th district of Bexar county, Texas, and conveyances down to them the San Antonio Traction Company acquired and became the owner of all property, estates, rights and privileges of the San Antonio Street Railway Company and San Antonio Edison Company, and

Whereas, in the grants of rights and privileges to said four companies now defunct, limitations and duties valuable to the city and to the public were imposed which should be observed and performed by their successor companies, and

47 Whereas, the title to said franchises have been questioned by an opinion of the city attorney, and the good faith and credit of the city demand that it shall fulfill its obligations entered into between it and the said companies therefore,

Be it ordained by the city council of the city of San Antonio,

SECTION 1. That all of the rights and privileges heretofore granted by the city of San Antonio to the San Antonio Street Railway Company and to the San Antonio Edison Company, be and the same are hereby confirmed unto the said San Antonio Traction Company; and all of the limitations, duties, contracts and obligations imposed upon and required of said San Antonio Street Railway Company and said San Antonio Edison Company by the aforesaid ordinance of March 16th, 1899, or any other valuable ordinance in force at the time of the acquisition of the property of said two companies by the San Antonio Traction Company shall be, and the same are hereby imposed upon and required of said San Antonio Traction Co.; and the said traction company shall within three days from the passage of this ordinance file with the city clerk its written acceptance of the terms hereof."

7. On February 20, 1901, the Grand Avenue R. R. Co. made a written conveyance to the San Antonio Traction Company of its street railway line extending from Alamo Heights, a suburban ad-

dition of the city of San Antonio, through said addition to River avenue, thence along said avenue to Grand avenue, thence via Grand avenue to the junction of Austin street and Grand avenue, together with all the electrical machinery owned by the company and formerly owned by the Alamo Heights R. R. Company.

It appears from these facts, relied upon by appellant as a defense to appellee's action, that it owns the lines of street railway at one time owned and operated by three separate and distinct street railway corporations, which it now operates as one system of railways. What rights, privileges and immunities were granted to the lines of railway it acquired from the San Antonio Edison Company and the Grand Avenue Ry. Co. do not appear from the evidence in this case. And if it should be conceded that appellant acquired by its purchase at judicial sale of the San Antonio St. Ry. Co.'s property, all the rights, privileges and immunities granted that company by its charter, and that the rights thus acquired were such as could not be impaired by legislation during the period covered by such
48 charter, it would by no means follow that it acquired any such rights, privileges or immunities by its purchase of the lines of railway and property of the other two corporations. If it did not, then what right has appellant to claim for its entire street railway system the rights, privileges and immunities granted only to the San Antonio Street Ry. Co.? It does not appear from the evidence when the San Antonio Traction Company was incorporated, but it was sued and has answered in this case as a corporation, and as such it must be taken, as the evidence indicates, to roperate its system of railroads as an entirety by its corporate authority granted by its charter, and not that its system of roads is operated, controlled and governed and its rights determined by the charters of the three "defunct" corporations whose property it acquired. The charters of those corporations necessarily expired when they ceased to exist, and appellant's defense in this action must depend upon such rights, privileges and immunities as were granted when it was brought into being by its charter. And the validity of the act of the legislature upon which appellee grounds this action must depend upon the present constitution of this State, and not upon the constitution in force when the charter of the San Antonio Street Ry. Co. was granted. For it not being shown when appellant was incorporated, it must be presumed that it is subject to the laws of the State passed in pursuance of its present constitution.

Under this view of the case, it will not be necessary for us to consider whether the act of the 28th legislature, upon which this action is based, impairs the obligation of any contract made between the city of San Antonio and the San Antonio St. Ry. Co. or, considering the charter of such corporation as a contract, between said company and the State of Texas. It would seem, however, that inasmuch as the city of San Antonio made no contract with the San Antonio Street Ry. Co. regulating or controlling the amount to be charged for fares over its line until March 16, 1899, (if the ordinance of that

date authorizing said company to charge five cents fare can be deemed a contract), which was twenty-three years after the adoption of the present constitution, which specially provides that all privileges and franchises granted by the legislature or created under its authority shall be subject to its control, that no obligation of contract between the city and said street Ry. Co. or between the State and such company was violated or in any way impaired by the act of the legislature in question. For the right by virtue of the
49 ordinance of March 16, 1899, of the San Antonio St. Ry. Co. to charge five cents fare for one continuous ride over any one of its lines did not vest until after the present constitution went into effect, and therefore such regulation of fare was subject under it to legislative control. Adams *vs.* Yazoo etc. Ry. Co., 77 Miss. 194, 60 L. R. A. 1; 24 Southern Rep. 200, 180 U. S. 1. G. H. & S. A. Ry. Co. *vs.* Texas, 170 U. S. 226.

But however, this may be, it not being shown that appellant was incorporated prior to the time the constitution of 1876 went into effect, it must be considered to have taken its charter and all the provisions it contains subject to the general law of the State and of such changes as may be made in such general law, and subject to future constitutional provisions and further legislation. Penn. Ry. Co. *v.* Miller, 132 U. S. 75, 33 L. Ed., 267.

The legislature has the power to regulate the rates of fare of a street railway company in the absence of any provision in its charter relinquishing that right. Wood on Railroads (Minor's ed.) 1658; Nellis St. Railroads, 40. Provided, however, the rates established are not so unreasonable as to practically destroy the value of the property of the corporation and thereby depriving it of its property without due process of law, and denying it equal protection of the law. Covington & L. Turnp. Co. *v.* Sanford, 164 U. S. 578; 41 L. Ed. 560; St. L. etc. R. Co. *vs.* Gill, 156 U. S. 649, 39 L. Ed 567. This right, under the present constitution, cannot, as we have seen, be relinquished by a provision in the company's charter, and it is not contended, and there is nothing in the evidence tending to show that the rate of fare which appellee claims he is entitled to under the act of 1903 is such as not to leave to the company a sufficient income to pay repairs and a fair income on its investment.

We must hold, therefore, that the matters plead and proven by appellant failed to show any valid constitutional objection to the enforcement of the act of April 10, 1903, against the San Antonio Traction Company, nor any reason why it should not be compelled to issue and sell to appellee the half-fare tickets that the facts show him entitled to under said act. Wherefore the judgment of the district court is affirmed.

H. H. NEILL,
Associate Justice.

50 Endorsed: No. 3003, In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. San Antonio

Traction Co., appellant, *vs.* George A. Altgelt, appellee. From Bexar county. Opinion by H. H. Neill, associate justice. Filed in the court of civil appeals, at San Antonio, Texas, May 4th, 1904. H. E. Hildebrand, clerk.

Judgment of Court of Civil Appeals, Wednesday, May 4th, A. D. 1904.

SAN ANTONIO TRACTION CO., Appellant,
vs.
GEORGE A. ALTGELT, Appellee. } No. 3003.

Appeal from District Court (37th Judicial District) of Bexar County.

This cause came on to be heard on the transcript of the record and the same being inspected because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, San Antonio Traction Company, and its sureties, A. W. Houston and Reagan Houston, pay all costs in this behalf incurred and this decision be certified below for observance.

Motion for a Rehearing.

In the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, Sitting at San Antonio.

SAN ANTONIO TRACTION COMPANY, Appellant,
vs.
GEORGE A. ALTGELT, Appellee. } No. 3003.

Appeal from the District Court, 37th Judicial District, Bexar County, Texas.

Appellant's Motion for Rehearing.

Now comes appellant, The San Antonio Traction Company, and asks the court to grant a re-hearing herein and set aside the
51 judgment herein rendered on May 4th, 1904, affirming the judgment of the district court, and to reverse and remand this cause or here render in favor of appellant for the following reasons, to-wit:

The court erred in refusing to reverse the judgment of the trial court and render judgment in favor of appellant for the error shown in appellant's first assignment of error, because the trial court erred in finding in favor of plaintiff in granting a writ of mandamus, because the evidence shows beyond dispute:

1st. That the San Antonio Traction Company was incorporated by special act of the legislature of Texas, May 2nd, 1874, in which it is provided: "Sec. 8. That all contracts made or entered into between the mayor and alderman of the city of San Antonio and the said company or any privileges or rights granted by the said mayor and aldermen of the city of San Antonio to the said company, shall be in all respects legal and binding on the aforesaid contracting parties. Sec. 9. This charter shall remain in full force and effect for the period of fifty years."

2nd. On October 5th, 1875, the city of San Antonio, by ordinance, granted right-of-way, etc., to said company by ordinance, but did not in said ordinance fix the rate of fares which might be charged and did not require the paving of any portion of the streets occupied by its track and did not provide for transfers.

3rd. On the 16th of March, 1899, the city, by ordinance, extended the time for which the franchise of said company should exist and as a condition thereof provided that thereafter said company should charge 5 cents fare for each passenger, should grant transfer from one line to another and should do certain paving and improving of the streets, which ordinance was accepted and agreed to by the company.

4th. The San Antonio Traction Company, through judicial sale of 4th day of April, 1900, and conveyances thereunder, became the successor and owner of all the rights of the San Antonio Street Railway Company and subject to all the duties and liabilities of the city's grants to it, which were granted and confirmed to the said San Antonio Traction Company by ordinance of said city of the 7th day of August, 1900. All of said ordinances were accepted in due form by said company. Which facts establish a contract valid and binding between the city of San Antonio and the San Antonio
52 Traction Company by the terms of which the said traction company had the right to charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other, which contract cannot be impaired by legislative enactment by the State or ordinance by the city and the act of the legislature of Texas, being an act entitled:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act.

"SECTION 1. Be it enacted by the legislature of the State of Texas, All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of

the age of 12 years or less at and for one-half the fare or charge regularly collected by such person or corporation for the transportation of adult persons; provided that the act shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run.

"SEC. 2. All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty each, good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold, to such students, and shall not be used except during the months of
53 the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.

"SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge.

"SEC. 4. All such persons or corporations are required to accord to all passengers referred to in sections 1, 2 and 3 of this act, the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.

"SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars.

"SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.

"SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended."

And specially the second section of said act wherein it is provided:

"All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line, or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grade not higher than the grades of the public high school, of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in
54 regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets," is in contravention of section 16 of article 1, and sections 17 and 19 of article 1 of the constitution of Texas, and of section 10, article 1, and of section 1 of the 14th amendment to the Constitution of the United States, in that it impairs the obligation of said valid and subsisting contract between the city of San Antonio and the San Antonio Traction Company, and deprives said company of its property and revenues without due process of law and without compensation, and denies to said company the equal protection of the law, and is therefore as to this appellant, the San Antonio Traction Company, unconstitutional and void.

Second.

The court erred in refusing to reverse the judgment of the trial court and here render judgment in favor of appellant for the error shown in appellant's second assignment of error, because the trial court erred in granting the writ of mandamus prayed for because the statute, chapter CXVI, being entitled "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act" passed by the 28th legislature of Texas, is unconstitutional as to this defendant, in that it is in contravention of section 16, or article 1, of the constitution of Texas, and of section 10, article 1, of the Constitution of the United States, in this, that the said act imparied the valid and subsisting contract between the city of San Antonio

and this defendant by which and under the ordinances of the city of San Antonio this defendant has the right to charge 5 cents fare for passage over its lines.

Third.

The court erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant
55 for the reasons shown in appellant's third assignment of error because the trial court erred in finding for plaintiff and in granting a writ of mandamus herein, because the act of the legislature, viz: "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for the violation of this act" under which the court acted in granting said writ, is in contravention of section 17 and 19, of article 1, of the constitution of Texas, and of section 1 of the 14th amendment of the Constitution of the United States, in that it deprives this defendant of its property without due process of law and without compensation, and denies to this defendant the equal protection of the laws of the land.

These three assignments of error will be considered together, raising as they do the question of the constitutionality of the statute in question as to this appellant and being in our opinion decisive of the case at bar.

Statement.

The San Antonio Street Railway Company was chartered by special act of the legislature, May 2nd, 1874, prior to the adoption of the present constitution, and sections 8 and 9 of said special charter provided (Trans. p. 24).

"SEC. 8. That all contracts made or entered into by and between the mayor and alderman of the city of San Antonio and the said company or any privileges or rights granted by the said mayor and aldermen of the city of San Antonio to the said company shall be in all respects legal and binding on the aforesaid contracting parties.

"SEC. 9. This charter shall remain in full force and effect for the period of fifty years."

Under said charter, the city of San Antonio, by ordnance of October 5th, 1875, (Trans. pp. 25 and 26) granted right-of-way and certain privileges to said company, and later, on 16th of March, 1899, by ordinance, agreed to and accepted by the street railway company, provided that it should charge five cents fare for one continuous ride over any one of its lines with one transfer to or
56 from either line to the other. (Trans. pp. 26 and 27), with privilege of assignment of the franchises or either of them granted by said ordinance. (Trans. Ib.). The rights, privileges and

franchises granted by said ordinance were assigned through mesne conveyances and court orders to, and were acquired by appellant (Trans. pp. 27, 28 and 29) and on the 7th day of August, 1900 (Trans. pp. 29 and 30) were confirmed in and granted to and accepted by appellant, and on January 7th, 1901, (Trans. pp. 30 and 31) *the same were extended by the city over River avenue in said* city.

The act of legislature, and especially the second section thereof, all quoted in assignment of error No. 1 (Trans. pp. 46, 47 and 48) requires appellant to transport persons for less than (one-half of) the fare which the ordinance of the city provides shall be charged, thus depriving it of one-half of its revenues on such passengers and violating the valid and subsisting contract between it and the city by which it shall charge 5 cents fares.

Authorities.

That the city of San Antonio has the right to prescribe the terms upon which it will consent to the occupation of its streets, including the right to prescribe the fare that a street railway may charge. The constitution of Texas, sec. 7, art. 10, Mayor *vs.* Houston Ry. Co. 83 Tex. 548. Nellis on Street Surface Railroads para. 11. Dillon on Municipal Corporations, 4th ed. para. 718.

That the grant of rights and franchises from a municipality to a street railway corporation constitutes a part of the assets and property of such corporation and as such are guaranteed the equal protection of the laws of the land, and the corporation cannot be deprived thereof without due process of law. City Water Co. *vs.* State, 88 Tex. p. 600. Detroit *vs.* Cit. St. Ry. Co. 184 U. S. 369; Law ed. vol. 46, pp. 610–11. Constitution of the United States, sec. 1, 14th amendment. Constitution of Texas, sections 17 and 19, article 1.

That the State of Texas cannot pass a law impairing the obligation of contract between the city of San Antonio and appellant, by which appellant had the right to charge five cent fares. General Laws, 1903, chapter CXVI, pp. 182–3; United States Constitution sec. 10, art. 1. Texas Constitution, section 16, art. 1. City of Detroit *vs.* Cit. St. Ry. Co. 184 U. S. 369 46 Lawyers ed. p. 592.

57 That the constitution of Texas does not reserve to the State the right to regulate street railway fares provided for in franchises from the city. Constitution of Texas, art. 10, sec-. 2 & 7. Constitution of Texas, art. 12, sec-. 3, 4 & 5.

Argument.

It is well settled by the authorities that the power vested in the municipality to consent or with-hold its consent to the occupation of its streets by a street railroad necessarily implies the right in the municipality to impose conditions incident to its grant of a fran-

chise to a street railway company to occupy its streets. It is stated by Judge Dillon in his work on municipal corporations and by Mr. Nellis in his work on street railroads, as heretofore cited, that rates of fare may be fixed in the franchise granted to such street railroad corporations. It is equally well settled by the authorities that the franchise granted by a municipality to a street railroad company imposing conditions upon which its streets may be occupied by a street railroad company and the acceptance of such grant by the street railroad constitute a valid and subsisting contract between the municipality and the street railroad corporation and that the rights in the street railroad corporation by reason of such franchise constitute property, entitled to the protection afforded other property by law.

It is settled by our Texas authorities that sec. 7, art 10 of the constitution of Texas, which prohibits the legislature from granting the right to construct and operate a street railroad in any city or town or village without first acquiring the consent of the local authorities, by implication recognizes the right of a city to grant to a street railroad a franchise to occupy the streets of the city. It is further held in the case of the mayor of Houston *vs.* Houston Street Railroad Co. that when such grant is accepted and acted upon by the street railway company it becomes a vested right or perfected contract.

The forfeiture of the charter of a public service corporation in no manner affects the property rights arising out of the franchise from a municipal corporation and the contract between the corporation and the municipality inures to the stockholders of the corporation and may be sold and assigned as other property rights, and the full benefit thereof held and enjoyed by the assignee. This proposition is well settled by the authorities and approved by our
58 supreme court.

In the state of the pleading in this case, we believe the record is sufficient to show that a portion of the line of appellant over which appellee sought to obtain half-fare tickets had been the property of the San Antonio Street Railway Company and acquired by appellant from it. The first amended original answer of appellant sets out and alleges the contract between the city of San Antonio and the San Antonio Street Railway Company and the acquisition of property of said San Antonio Street Railway Company and particularly the contract with the city of San Antonio by this appellant and that by reason thereof this appellant was entitled to charge five cents fare upon its lines. In replication to such pleading the plaintiff filed a supplemental petition alleging that that portion of the street railroad owned and operated by appellant over River and Grand avenue- had not been acquired by this appellant from the San Antonio Street Railway Company by mesne conveyances. The original petition in the case alleged that appellee sought to obtain half-fare tickets upon and over River avenue, Grand avenue, Austin street, Tenth street and Avenue "C." Under these circumstances we

believe it must be held that the pleading of appellee admitted that the line of street railroad upon and over Austin and Tenth streets and Avenue C had been acquired by appellant from the San Antonio Street Railway Company.

The property rights which inured to the San Antonio Street Railway Company by reason of its contract with the city of San Antonio could not be and were not in any manner affected by its subsequent conveyance to this appellant, nor does the fact that this appellant was chartered under the general laws enacted since the adoption of the new constitution in any manner affect the property rights so acquired by it from the San Antonio Street Railway Company and a portion of the line over which appellee sought to obtain half-fare tickets having been acquired by this appellant from the San Antonio Street Railway Company, appellee could not obtain the remedy of mandamus because the other portion of the line over which he sought to ride had not been so acquired.

We believe, however, that it is immaterial whether the San Antonio Street Railway Company, by reason of its charter and the franchise from the city of San Antonio acquired the property right which was subsequently acquired by appellant under the con-
59 stitution of 1876 or prior thereto. The constitution of 1876, in prohibiting the legislature from granting the right to construct a line of street railway upon the street of a city without the consent of the local authorities, by implication granted to the city of San Antonio the right to fix the terms upon which its streets might be occupied, and incident thereto, the right to impose such conditions as it might see fit upon such franchise, and among such conditions, to fix the fare which such street railroads might charge, unless the constitution of 1876 reserved to the State the right to control and regulate such fares. And the grant of a franchise authorizing the occupation of its streets to the San Antonio Street Railway Company and the San Antonio Edison Company, constituted a contract between the city of San Antonio and said companies, assignable according to its terms and this appellant as appears from the record herein, acquired such contract by mesne conveyances from said corporation and is vested with the property rights arising therefrom, one of which is the right to charge five cent fares unless, as heretofore stated, the right to regulate its fares is reserved to the State under the constitution of 1876.

The constitution of 1876, art. 12, sec. 3, 4 & 5, reserves to the State the right to authorize and regulate freights, tolls, wharfage or fares levied or collected or proposed to be levied or collected by corporations for the use of highways, lands, wharves, bridges and ferries devoted to public use, and by sec. 2 of art. 10, railroads are declared to be public highways, and the legislature is directed to pass laws to regulate their freight and passenger tariffs. Sec. 7, art. 10, makes a distinction between streets and highways. It is clear then that the State reserves to itself by the constitution of 1876, the right to regulate fares for the use of the highways and other property de-

voted to public use, intending thereby to reserve to the State the power to regulate corporations such as ferries, bridge companies, wharf companies, and like concerns which controlled, by charter grants, property devoted to public use, and railroads are declared to be public highways. Street railroads are so entirely different in their nature from the public service corporations whose fare the State specially reserves the right to fix and regulate that no reasonable construction of the constitution will permit the conclusion that the State has as well reserved the right to regulate the fares of such corporations. Wharf companies, bridge companies and the like monopolize property devoted to public use and are endowed with such
60 special privileges that the right to regulate their fares and tolls must necessarily be reserved to the State. Railroads are great public highways reaching from city to city and intended to accomodate all of the inhabitants of the State and their construction necessitates completely occupying the property which they traverse, and, where they enter cities and towns, damaging the adjoining property owners by reason of burdens which they impose upon the streets. Street railways however, are purely local concerns intended only to serve the inhabitants of the particular city or town in which they are constructed, placing no additional burdens upon the public streets, not damaging the abutting property owners and in no manner interferring with the free use and enjoyment of the streets. The theory of self government, in which democracies have their growth, consistently followed would repose in the municipality where a street railway company seeks to do business, the power to impose the conditions upon which it may occupy its streets, and certainly, in the exercise of such power, the municipality should be afforded, the right to regulate the fares of its local public service corporations; otherwise, one of the greatest, if not the greatest advantage which may flow to the inhabitants of a city in the exercise of the city's right to impose conditions would be lost to its people. These considerations, we believe, moved the makers of our constitution to the adoption of section 7, article 10 without reserving the right in the legislature to regulate the fares of the street railways and we most earnestly urge that upon a fair construction of the State constitution it must be conceded that it was intended to grant to the municipality the right to impose any conditions upon the occupation of its streets by a street railroad. We insist, therefore, that under the franchise from the city of San Antonio to the San Antonio Street Railway Company and the San Antonio Edison Company, acquired by appellant by mesne conveyances, there exists in this appellant the property right and the contract right to charge five cent fares for one continuous passage over its lines of street railway in the city of San Antonio, and that the half-fare act of the legislature deprives appellant of its property without due process of law or compensation and impairs the obligation of the valid and subsisting contract between appellant and the city of San Antonio and is therefore con-

trary to the provisions of the constitutions of the State of Texas and of the United States as hereinabove set out and therefore void.

61 Fourth.

The court erred in refusing to reverse the judgment of the trial court and here render judgement in favor of appellant for the error shown in appellant's eighth assignment of error, because the trial court erred in overruling defendant's fifth special exception to plaintiff's petition, because it does not appear from said pleading that plaintiff is entitled to any right by reason of his attendance upon Magruder's school for boys.

Statement.

That portion of plaintiff's petition material to this question is as follows:

"That said George A. Altgelt is a student in a private school in said city, to-wit: the school known as Magruder's school for boys, situated within the limits of said city, and in which school the regular and elementary branches of learning are taught. That he is a regular attendant upon said school and so has been a regular attendant thereon since the 7th day of September, 1903, and expects and intends to so continue in regular attendance for the scholastic year and term thereof which will end on or about the first day of June, 1904."

"And at said time and place and then and there exhibited and tendered to said defendant company a certificate from the principal of said school so attended by said George A. Altgelt, showing him to be entitled to such tickets, to-wit: a certificate signed and issued by J. B. Magruder, principal of said Magruder's school for boys, certifying that said George A. Altgelt is a regular scholar attendant upon said school; that he is under the age of 17 years and in regular attendance upon said school as aforesaid, and is in a grade thereof not higher than the grade of the public high schools of this State situated within or adjacent to said city of San Antonio. That said school is situate on Dallas street in said city of San Antonio, and the regular sessions for the term of A. D., 1903–1904 began on the 7th day of September, A. D., 1903, and will end on or about the 1st day of June, A. D. 1904.

Appellant's fifth special exception to said petition is as follows: (Trans. p. 7):

"Fifth. It does not appear from said pleading that plaintiff is entitled to any right by reason of his attendance upon

62 "Magruder's school for boys." Said exception was presented to and overruled by the trial court and the court's action thereon duly excepted to, as shown by decree. (Trans. p. 18.)

Argument.

This court has disposed of this case upon the theory that the only question presented by the record herein is the constitutionality of the half-fare law. We respectfully urge however, that the pleading and proof in this case wholly fail to show that appellee was a student in attendance upon the class of school covered by the half-fare law and for that reason was not entitled to a writ of mandamus as prayed for.

It will be observed that such half-fare is accorded "to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State." Clearly this language of the law is intended to describe the classes of schools, whose students may procure the half-fare and evidences the desire and intention of the legislature to accord this privilege only to schools not graded higher than the public high schools of this State.

Furthermore, as appears from the title of the act and from section 2 thereof, the expressed intention of the legislature is to confer this privilege only on "academic, public or private schools:" an academic school or academy, according to the accepted dictionaries in this country, being "a school holding the rank between a university or college *or* elementary schools." It is evident then, that if there had been no further limitation placed upon the grade of school by the language of the statute, the privilege would have been confined to students of schools between the rank of elementary schools and colleges. The legislature did not intend, however, to confer this privilege upon the students of academic schools which ranked higher than the public free schools of this State; hence the further limitation that the academic schools should not be graded higher than the public high schools of this State.

The plaintiff in this case alleges he is a student in regular attendance upon Magruder's school for boys, but does not allege that such school is a public or private academic school of grades not higher than the public high schools of this State. He does not, therefore, show that he has the right to obtain or that it is the duty of the appellant to issue to him half-fare tickets, and his petition should be held insufficient upon the special exception interposed by appellant.

63 Fifth.

The court erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant for the reasons shown in appellant's tenth assignment of error because the trial court erred in overruling defendant's sixth special exception because if this proceeding be based upon chapter CXVI under the general laws of the 28th legislature of Texas, entitled "An act requiring all persons or corporations owning or operating street rail-

ways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violations of this act" then this defendant specially excepts to this action, because said act of the legislature is unconstitutional and void as to this defendant, in that it is in violation of section 7 of article 10 of the constitution of this State in that by it the legislature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the constitution.

Statement.

Defendent's sixth special reception to plaintiff's petition (Trans. p. 7) is as follows:—

"Sixth. If this proceeding be based upon chapter CXVI of the general laws of the 28th legislature of Texas, entitled "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than forty thousand inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons and providing penalties for violation of this act," then this defendant specially excepts to this action, because said act of the legislature is unconstitutional and void as to this defendant, in that it is in violation of section 7 of article 10 of the constitution of this State, in that by it the legislature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the constitution.

Said exception was presented to and overruled by the court and the court's action thereon duly excepted to as shown by decree. (Trans. p. 18.)

64 Authorities.

Constitution of Texas, sec. 7, art. 10.
Mayor *vs.* Houston Ry. Co., 83 Texas, 548.

Sixth.

The court erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant for the reasons shown in appel-ant's eleventh assignment of error, because the trial court erred in overruling defendant's tenth special exception to plaintiff's petition, because said act is unconstitutional and void as to this defendant because its enforcement is calculated to and will deprive this appellant of its revenues and property without compensation and without due process of law.

Statement.

Defendant's tenth special exception to plaintiff's petition is as follows. (Trans. p. 8.)

"Tenth. Said act is unconstitutional and void as to this defendant, because its enforcement is calculated to and will deprive this defendant of its revenues and property without compensation and without due process of law."

Said exception was presented to and overruled by the court and the court's action thereon duly excepted to as shown by decree. (Trans. p. 18.)

Authorities.

City Water Co. *vs.* State, 88 T. 600.
Detroit *vs.* City Ry. Co., 184, U. S. 369, Law ed. vol. 46, p. 610.
Constitution of the United States, sec. 1, 14th amendment.
Constitution of Texas, sec-. 17–19, art. 1.

Seventh.

The court erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant for the reasons shown in defendant's twelfth assign*em*-t of error, because the trial court erred in overruling defendant's eleventh special exception to plaintiff's petition, because said act of the legislature is in violation of sec. 10, of art. 1, of the Constitution of the United States, and of sec. 16, of art. 1, of the constitution of Texas, and in violation of sec. 1. of the 14th amendment of the Constitution of the United States, and of sec. 17, of art. 1, of the constitution of Texas, be-
65 cause said act impairs the obligation of a valid and subsisting contract existing between this defendant and the city of San Antonio and deprives this defendant of its property without due process of law and without compensation therefor.

Statement.

Defendant's eleventh special exception thereto is as follows: (Trans. p. 8.)

"Eleventh. Said act of the legislature is in violation of sec. 10, of art. 1, of the Constitution of the United States, and of sec. 16, of art. 1, of the constitution of Texas, and in violation of sec. 1, of the 14th amendment to the Constitution of the United States, and of sec. 17, art. 1, of the constitution of Texas, because said act impairs the obligation of the valid and subsisting contract existing between the defendant and the city of San Antonio and deprives this defendant of its property without due process of law and without compensation therefor."

Said exception was presented and overruled by the court and the court's action thereon duly excepted to as shown by decree. (Trans. p. 18.)

Authorities.

United States Constitution, sec. 10, art. 1.
Texas constitution, sec. 16, art. 1. sec. 1. 14th amendment.
City of Detroit *vs.* Cit. St. Ry. Co. 184, U. S. 369; 46 Lawyers' Ed. p. 592.

Eighth.

The court erred in refusing to reverse the judgment of the trial court herein and remand said cause for a new trial, for the reasons shown in appellant's thirteenth assignment of error, because the trial court erred in admitting in evidence over defendant's objection the certificate of J. B. Magruder as shown by defendant's bill of exception No. 1.

Statement.

Defendant's bill of exception No. 1, is as follows: (Tr. p. 35).
"Be it remembered that upon a trial of the above entitled cause plaintiff offered in evidence the certificate of J. B. Magruder, principal of Magruder's School for Boys, of which the following is a copy, to-wit:

THE STATE OF TEXAS, }
County of Bexar. }

In the City of San Antonio, Texas.

I, J. B. Magruder, principal of a private school in the city of San Antonio, Texas, known as Magruder's School for Boys, hereby certify that George A. Altgelt is a regular scholar attendant on said school, that he is under the age of seventeen years, in regular attend-
66 ance upon such school, and is in a grade thereof not higher than the grades of the public high schools of this State situate within or adjacent to the city of San Antonio.

I further certify that the said Magruder's School for Boys, and which the said George A. Altgelt so attends, is situate on Dallas street in said city of San Antonio, and that its regular session for the term A. D., 1903–1904 began on the 7th day of September, A. D., 1903, and ends on the 1st day *pf* June, A. D. 1904.

Witness my signature on this the 19th day of September A. D. 1903.

(S'd) J. B. MAGRUDER,
Principal, Magruder's School for Boys.

"To the introduction of which said certificate defendant objected because the same does not show that Magruder's School for Boys is an academic, public or private school, and because the said certificate does not show that the Magruder's School for Boys has no grades in it higher than the grades of the public high schools of

this State, and because it is not shown that defendant knew or was notified in any way that said school was of such character as described in the statute, which said objections were overruled by the court and the said certificate admitted in evidence, to which action and ruling of the court defendant then and there in open court excepted and tenders this its bill of exceptions No. 1, and asks that same be signed, filed and made a part of the record herein, which is accordingly done."

JOHN H. CLARK, Judge.

Authorities.

General Laws of 1903, Chapter CXVI, p. 182.

Ninth.

The court erred in refusing to reverse the judgment of the trial court herein and remand said cause for a new trial for the reasons shown in appellant's fourteenth assignment of error, because the trial court erred in admitting in evidence the testimony of plaintiff's witness, George C. Altgelt, as shown by defendant's bill of exceptions No. 2.

Statement.

Defendant's bill of exceptions No. 2 is as follows: (Trans. p. 37).

67 "Be it remembered that upon the trial of the above entitled cause the following proceedings were had:

"While plaintiff's witness, George C. Altgelt, was testifying for plaintiff on direct examination, plaintiff's counsel asked the witness the following questions:

Q. Do you know of what,—know what kind of school, what grade, what class of school, what it would be called?

To which question the defendant objected, because there is no allegation in the petition herein that the defendant knew or was notified in any way that the school which George A. Altgelt attended was of such character as described in the statute.

Whereupon plaintiff's counsel asked the witness the following question, and the witness was thereupon permitted to testify as follows, over the objection of defendant as hereinbefore set out duly urged to each of said questions and answers, and the court's action in admitting said evidence excepted to at the time:

Q. Is it a private or public school?
A. Private school, paid tuition.
Q. Do you know about the branches taught there?
A. I would call it a grammar school.

Q. Do you know about the studies your boy has there?

—. ——.

Q. I will ask the witness if he is acquainted with the studies of George A. Altgelt, and what they are?

A. Yes, sir.

Q. What are those studies?

A. They are strictly elementary.

Q. Could you name those studies?

A. Yes.

Q. I will ask you to name them?

A. Reading, writing, arithmetic, geography and spelling.

Q. State if you know if he is in about the same grade boys of his age generally are?

To which actions and rulings of the court in admitting the testimony hereinbefore set out over the objections hereinbefore stated and urged to all of said testimony, defendant's counsel duly excepted and tenders this its bill of exceptions No. 2, and asks that the same be signed, filed and made a part of the record herein, which is accordingly done.

JOHN H. CLARK, Judge."

68 Authorities.

General Laws 1903, Chapter CXVI, p. 182.

Tenth.

The court erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant for the reasons shown in appellant's fifteenth assignment of error because the trial court erred in holding that the city could not make a binding contract fixing such limitations as it might deem best, upon its consent to defendant to operate in the streets of the city of San Antonio.

Eleventh.

The court erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant because the trial court erred in holding that the State had the right reserved to it to fix the rates of fare on defendant's line and the right to change rates of fare fixed by the city of San Antonio.

Statement.

The San Antonio Street Railway Company was chartered by special act of the legislature, May 2nd, 1874, prior to the adoption of the present constitution, and sections 8 and 9 of said special charter provided (Trans., p. 22).

"SEC. 8. That all contracts made or entered into by and between the mayor and aldermen of the city of San Antonio and the said

company, or any privileges or rights granted by the said mayor and aldermen of the city of San Antonio to the said company shall be in all respect- legal and binding on the aforesaid contracting parties.

SEC. 9. This charter shall remain in full force and effect for the period of 50 years."

Under said charter, the city of San Antonio, by ordinance of October 5th, 1875 (Trans. pp. 25–26), granted right-of-way and certain privileges to said company, and later on the 16th of March, 1899, by ordinance agreed to and accepted by the street railway company, provided that it should charge five cents fare for one continuous ride over any one of its lines with one transfer to or from either line to the other. (Trans. pp. 26–27.) With privilege of assignment of the franchises or either of them granted by said ordinance.
69 (Trans. *Ib.*) The rights, privileges and franchises granted by said ordinance were assigned through mesne conveyances and court orders to and were acquired by appellant. (Trans. pp. 27, 28 and 29.) And on the 7th day of August, 1900, (Trans. pp. 29 and 30), were confirmed in and granted to and accepted by appellant, and on January 7th, 1901, (Trans. pp. 30 and 31). The same were extended by the city over River avenue in said city.

Authorities.

Constitution of Texas, sec. 7, art. 10.
Mayor *vs.* Houston Ry. Co., 83 Texas, 548.

Appellant represents that August E. Altgelt, who resides in Bexar County, Texas, is the attorney of record of the appellee.

Wherefore, appellant prays that notice according to law be given of this application, and that, on hearing hereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellant's original brief.

HOUSTON BROS.,
R. J. BOYLE,
Attorneys for Appellant, the San Antonio Traction Company.

Endorsed: No. 3003, with App. No. 4332 In the court of civil appeals, fourth supreme judicial district, sitting at San Antonio. San Antonio Traction Co., appellant, *vs.* George A. Altgelt, appellee. Appeal from the district court 37th judicial district, Bexar county, Texas. Appellant's motion for rehearing. Filed in the court of civil appeals at San Antonio, Texas, May 19th, 1904. H. E. Hildebrand, clerk. Filed in supreme court, July 14th, 1904. F. T. Connerly, clerk.

Order Overruling Motion.

S. A. TRACTION Co., Appellant,
vs.
GEORGE A. ALTGELT, Appellee. } No. 3003. Appeal from Bexar County.

The motion of appellant for a rehearing, filed May 19th, 1904, coming on to be heard and the court having duly considered
70 the same; it is ordered that said motion be and it is hereby overruled and it is further ordered that appellant, San Antonio Traction Company, and its sureties, A. W. Houston and Reagan Houston, pay all costs of this motion.

Application for Writ of Error to Supreme Court of Texas.

In the Supreme Court of the State of Texas.

SAN ANTONIO TRACTION COMPANY, Plaintiff in Error,
vs.
GEO. A. ALTGELT, Defendant in Error. } No. —.

Application for Writ of Error to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio.

The statement of the nature and result of this suit contained in the opinion of the court of civil appeals is sufficient to show jurisdiction in this court. This suit involves the constitutionality under the State and Federal Constitutions of the "children's half fare law" passed by the 28th legislature of Texas.

The judgment of the trial court in favor of defendant in error was affirmed by the court of civil appeals on May 4th, 1904. Motion for re-hearing of plaintiff in error was filed on May 19th, 1904, and overruled by said court on June 1st, 1904.

Whereupon plaintiff in error makes this its application for writ of error to the court of civil appeals for the fourth supreme judicial district of Texas and assigns the following errors committed by said court for which it asks that this court review this case and reverse and remand the same, or here render in its favor.

71 First.

The court of civil appeals erred in refusing to reverse the judgment of the trial court and render judgment in favor of appellant for the error shown in appellant's first assignment of error, because the trial court erred in finding in favor of plaintiff in granting a writ of mandamus, because the evidence shows beyond dispute:

1st. That the San Antonio Street Railway Company was incorporated by special act of the legislature of Texas, May 2nd, 1874, in

which it is provided: "Sec. 8. That all contracts made or entered into between the mayor and aldermen of the city of San Antonio and the said company or any privileges or rights granted by said mayor and aldermen of the city of San Antonio to the said company, shall be in all respects legal and binding on the aforesaid contracting parties. Sec. 9. This charter shall remain in full force and effect for the period of fifty years."

2nd. On October 5th, 1875, the city of San Antonio by ordinance, granted right-of-way, etc. to said company by ordinance, but did not in said ordinance fix the rate of fares which might be charged and did not require the paving of any portions of the streets occupied by its track and did not provide for transfers.

3rd. On the 16th of March, 1899, the city, by ordinance, extended the time for which the franchise of said company should exist and as a condition thereof provided that thereafter said company should charge 5 cents fare for each passenger, should grant transfer from one line to another and should do certain paving and improvement of the streets, which ordinance was accepted and agreed to by the company.

4th. The San Antonio Traction Company, through judicial sale on 4th day of April, 1900, and conveyances thereunder became the successor and owner of all the rights of the San Antonio Street Railway Company and subject to all the duties and liabilities of the city's grants to it, which were granted and confirmed to the said San Antonio Traction Company by ordinance of said city of the 7th day of August, 1900. All of said ordinances were accepted in due form by said company. Which facts establish a contract valid and binding between the city of San Antonio and the San Antonio Trac-
72 tion Company by the terms of which the said traction company had the right to charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other, which contract cannot be impaired by legislative enactment by the State or ordinance by the city and the act of the legilsature of Texas, being an act entitled:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act.

"SECTION 1. Be it enacted by the legislature of the State of Texas: All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children under the age of twelve years or less at and for one-half the fare or charge regularly collected by such person or corporation for the transportion of

adult persons; provided that this act shall not apply to street cars carrying children or students to and from schools colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run.

"SEC. 2. All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty each, good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, or grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same on the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years
73 of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.

SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge.

SEC. 4. All such persons or corporations are required to accord to all passengers referred to in sections 1, 2 and 3 of this act the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.

SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars.

SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.

SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended."

And especially the second section of said act wherein it is provided: "All such persons or corporations owning or operating street rail-

ways shall sell or provide for the sale of tickets in lots of twenty each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grade not higher than
74 the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets" is in contravention of section 16 of article 1, and sections 17 and 19 of article 1 of the constitution of Texas, and of section 10, article 1, and of section 1, of the 14th amendment to the Constitution of the United States, in that it impairs the obligation of said valid and subsisting contract between the city of San Antonio and the San Antonio Traction Company, and deprives said company of its property and revenues without due process of law and without compensation and denies to said company the equal protection of the law, and is therefore as to this appellant, The San Antonio Traction Company, unconstitutional and void.

Second.

The court of civil appeals erred in refusing to reverse the judgment of the trial court and here render judgment in favor of appellant for the error shown in appellant's second assignment of error, because the trial court erred in granting the writ of mandamus prayed for because the statute, chapter CXVI, being entitled "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act" passed by the 28th legislature of Texas, is unconstitutional as to this defendant, in that it is
75 in contravention of section 16, of article 1, of the constitution of Texas, and of section 10, article 1, of the Constitution of the United States, in this, that the said act impaired the valid and subsisting contract between the city of San Antonio and this defendant by which and under the ordinance of the city of San Antonio this defendant has the right to charge 5 cents fare for passage over its lines.

Third.

The court erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant for the reasons shown in appellant's third assignment of error because the trial court erred in finding for plaintiff and in granting a writ of mandamus herein, because the act of the legislature, viz: "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing the penalties for violation of this act" under which the court acted in granting said writ, is in contravention of sections 17 and 19, or article 1, of the constitution of Texas, and of section 1 of the 14th amendment of the Constitution of the United States, in that it deprives this defendant of its property without due process of law and without compensation, and denies to this defendant the equal protection of the laws of the land.

These three assignments of error will be considered together, raising as they do, the question of the constitutionality of the statute in question as to this appellant and being in our opinion decisive of the case at bar.

Statement.

The San Antonio Street Railway Company was chartered by special act of the legislature May 2nd, 1874, prior to the adoption of the present constitution, and sections 8 and 9 of said special charter provided (Trans. p. 24):

"SEC. 8. That all contracts made or entered into by and between the mayor and aldermen of the city of San Antonio and the
76 said company or any privileges or rights granted by the said mayor and aldermen of the city of San Antonio to the said company shall be in all respects legal and binding on the aforesaid contracting parties.

SEC. 9. This charter shall remain in full force and effect for the period of fifty years."

Under this charter, the city of San Antonio, by ordinance of October 5th, 1875 (Trans. pp. 25 and 26) granted right-of-way and certain privileges to said company, and later, on 16th of March, 1899, by ordinance agreed to and accepted by the street railway company, provided that it shall charge five cents fare for one continuous ride over any one of its lines with one transfer to or from either line to the other. (Trans. pp. 26 and 27) with privilege of assignment of the franchises or either of them granted by said ordinance. (Trans. *Ib.*) The rights, privileges and franchises granted by said ordinance were assigned through mesne conveyances and court orders to, and

were acquired by appellant (Trans. pp. 27, 28 and 29) and on the 7th day of August, 1900 (Trans. pp. 29 and 30) were confirmed in and granted to and accepted by appellant, and on January 7th, 1901 (Trans. pp. 30 and 31) the same were extended to the city over River avenue in said city.

The act of legislature, and especially the second section thereof, all quoted in assignment of error No. 1 (Trans. pp. 46, 47 and 48) requires appellant to transport persons for less than (one-half of) the fare which the ordinance of the city provides shall be charged, thus depriving it of one-half of its revenues on such passengers and violating the valid and subsisting contract between it and the city by which it shall charge 5 cent fares.

Authorities.

That the city of San Antonio has the right to prescribe the terms upon which it will consent to the occupation of its streets, including the right to prescribe the fare that a street railway may charge:

The Constitution of Texas, sec. 7, art. 10.

Mayor *v.* Houston R'y Co. 83 Texas, 548.

Nellis on Street Surface Railroads para. 11.

Dillon on Municipal Corporations, 4th Ed. para. 718.

77 That the grant of rights and fran-hises from a municipality to a street railway corporation constitutes a part of the assets and property of such corporation and as such are guaranteed to equal protection of the laws, of the land, and the corporation cannot be deprived thereof without due process of law:

City Water Co. *v.* State, 88 Tex. p. 600.

Detroit *v.* City St. Ry. Co. 184 U. S. 369, Law Ed. vol. 46, pp. 610–611.

Constitution of the United States, sec. 1, 14th amendment.

Constitution of Texas, section- 17 and 19, article 1.

That the State of Texas cannot pass a law impairing the obligation of contract between the city of San Antonio and appellant by which appellant had the right to charge five cent fares:

General Laws, 1903, chapter CXVI, pp. 182–3.

United States Constitution sec. 10, art. 1.

Texas Constitution sec. 16, art. 1.

City of Detroit *v.* Cit. St. Ry. Co. 184 U. S. 369, 46 Law Ed. p. 592.

That the constitution of Texas does not reserve to the State the right to regulate street railway fares provided for in franchises from the city:

Constitution of Texas, art. 10, sec-. 2 and 7.

Constitution of Texas, art. 12, sec-. 3, 4, and 5.

Argument.

It is well settled by the authorties that the power vested in the municipality to consent or withhold its consent to the occupation of

its streets by a street railroad necessarily implies the right in the municipality to impose conditions incident to its grant of a franchise to a street railway company to occupy its streets. It is stated by Judge Dillon in his work on municipal corporations and Mr. Nellis in his work on street railroads, as heretofore cited, that rates of fare may be fixed in the franchise granted to such street railroad corporation. It is equally well settled by the authorities that the franchise granted by a municipality to a street railroad company
78 imposing conditions upon which its streets may be occupied by a street railroad company and the acceptance of such grant by the street railroad constitute a valid and subsisting contract between the municipality and the street railroad corporation and that the rights in the street railroad corporation by reason of such franchise constitute property, entitled to the protection afforded other property by law.

It is settled by our Texas authorities that sec. 7, art. 10 of the constitution of Texas, which prohibits the legislature from granting the right to construct and operate a street railroad in any city or town or village without first acquiring the consent of the local authorities, by impli-ation recognizes the right of a city to grant to a street railroad a franchise to occupy the street of the city. It is further held in the case of the Mayor of Houston *v.* Houston Street Railroad Co. that when such grant is accepted and acted upon by the street railway company it becomes a vested right or perfected contract.

The forfeiture of the charter of a public service corporation in no manner affects the property rights arising out of the franchise from a municipal corporation and the contract between the corporation and the municipality inures to the stockholders of the corporation and may be sold and assigned as other property rights, and the full benefit thereof held and enjoyed by the assignee. This proposition is well settled by the authorities and approved by our supreme court.

In the state of the pleading in this case, we believe the record is sufficient to show that a portion of the line of appellant over which appellee sought to obtain half-fare tickets had been the property of the San Antonio Street Railway Company and acquired by appellant from it. The first amended original answer of appellant sets out and alleges the contract between the city of San Antonio and the San Antonio Street Railway Company, and the acquisition of property of said San Antonio Street Railway Company and particularly the contract with the city of San Antonio by this appellant and that by reason thereof this appellant was entitled to charge five cents fare upon its lines. In replication to such pleading the plaintiff filed a supplemental petition alleging that that portion of the street railroad owned and operated by appellant over River and Grand
79 avenue had not been acquired by this appellant from the San Antonio Street Railway Company by mesne conveyances. The original petition in the case alleged that appellee sought to obtain half-fare tickets upon and over River avenue, Grand avenue,

Austin street, Tenth street and Avenue "C." Under these circumstances we believe that it must be held that the pleading of appellee admitted that the line of street railroad upon and over Austin and Tenth streets and Avenue "C." had been acquired by appellant from the San Antonio Railway Company.

The property rights which inure to the San Antonio Street Railway Company by reason of its contract with the city of San Antonio could not be and were not in any manner affected by its subsequent conveyance to this appellant, nor does the fact that this appellant was chartered under the general laws enacted since the adoption of the new constitution in any manner affect the property rights so acquired by it from the San Antonio Street Railway Company and a portion of the line over which appellee sought to obtain half-fare tickets having been acquired by this appellant from the San Antonio Street Railway Company, appellee could not obtain the remedy of mandamus because the other portion of the line over which he sought to ride had not been so acquired.

We believe, however, that it is immaterial whether the San Antonio Street Railway Company, by reason of its charter and the franchise from the city of San Antonio acquired the property right which was subsequently acquired by appellant under the constitution of 1876 or prior thereto. The constitution of 1876 in prohibiting the legislature from granting the right to construct a line of street railway upon the street- of a city without the consent of the local authorities, the implication granted to the city of San Antonio the right to fix the terms upon which its streets might be occupied, and incident thereto, the right to impose such conditions as it might see fit upon such franchise, and among such conditions, to fix the fare which such street railroads might charge, unless the constitution of 1876 reserved to the State the right to control and regulate such fares. The grant of a franchise authorizing the occupation of its streets to the San Antonio Street Railway Company and the San Antonio Edison Company, constituted a contract between the city of San Antonio and said companies, assignable according to its
80 terms and this appellant as appears from the record herein, acquired such contract by mesne conveyances from such corporation and is vested with the property rights arising therefrom, one of which is the right to charge five cent fares; unless, as heretofore stated, the right to regulate its fares is reserved to the State under the constitution of 1876.

The constitution of 1876, art. 12, sec-. 3, 4 and 5, reserves to the State the right to authorize and regulate freights, tolls, wharfage or fares levied or collected or proposed to be levied or collected by corporations for the use of highways, lands, wharves, bridges and ferries devoted to public use, and by sec. 2 art. 10, railroads are declared to be public highways, and the legislature is directed to pass laws to regulate their freight and passenger tariffs. Sec. 7, art. 10, makes a distinction between streets and highways. It is clear then that the State reserves to itself by the constitution of 1876, the right to

regulate fares for the use of the highways and other property devoted to public use, intending thereby to reserve to the State the power to regulate corporations such as ferries, bridge companies, wharf companies, and like concerns which controlled by charter grants, property devoted to public use, and railroads are declared to be public highways. Street railroads are so entirely different in their nature from the public service corporations whose fare the State specially reserves the right to fix and regulate that no reasonable construction of the constitution will permit the conclusion that the State has as well reserved the right to regulate the fares of such corporations. Wharf companies, bridge companies and the like monopolize property devoted to public use and are endowed with such special privileges that the right to regulate their fares and tolls must necessarily be reserved to the State. Railroads are great public highways reaching from city to city and intended to accommodate all the inhabitants of the State and their construction necessitates completely occupying the property which they traverse, and where they enter cities and towns damaging the adjoining property owners by reason of burdens which they impose upon the streets. Street railways however, are purely local concerns intended only to serve the inhabitants of the particular city or town in which they are constructed, placing no additional burdens upon the public streets, not damaging the abut-
81 ting property owners and in no manner interfering with the free use and enjoyment of the streets. The theory of self government in which democracies have their growth, consistently followed, would repose in the municipality where a street railway company seeks to do business, the power to impose the conditions upon which it may occupy its streets and certainly, in the exercise of such power, the municipality should be afforded the right to regulate the fares of its local public service corporations; otherwise, one of the greatest, if not the greatest advantage which may flow to the inhabitants of a city in the exercise of the city's right to impose conditions would be lost to its people. These considerations we believe, moved the makers of our constitution to the adoption of sec. 7, art. 10 without reserving the right in the legislature to regulate the fares of the street railways and we most earnestly urge that upon a fair construction of the State constitution it must be conceded that it was intended to grant to the municipality the right to impose any conditions upon the occupation of its streets by a street railroad. We insist, therefore, that under the franchise from the city of San Antonio to the San Antonio Street Railway Company and the San Antonio Edison Company, acquired by appellant by mesne conveyances, there exists in this appellant the property right and the contract right to charge five cents fares for one continuous passage over its lines of street railway in the city of San Antonio, and that the half-fare act of the legislature deprives appellant of its property without due process of law or compensation and impairs the obligation of the valid and subsisting contract between appel-

lant and the city of San Antonio and is therefore contrary to the provision of the constitutions of the State of Texas, and of the United States as hereinabove set out and therefore void.

Fourth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court and here render judgment in favor of appellant for the error shown in appellant's eighth assignment of error, because the trial court erred in overruling defendant's fifth special exception to plaintiff's petition, because it does not appear
82 from said pleading that plaintiff is entitled to any right by reason of his attendance upon Magruder's School for Boys.

Statement.

That portion of plaintiff's petition material to this question is as follows:

"That said George A. Altgelt is a student in a private school in said city, to-wit: the school known as Magruder's school for boys situated within the limits of said city, and in which school the regular and elementary branches of learning are taught. That he is a regular attendant upon said school and so has been a regular attendant thereon since the 7th day of September, 1903, and expects and intends to so continue in regular attendance for the scholastic year and term thereof, which will end on or about the 1st day of June, 1904."

And at said time and place and then and there exhibited and tendered to said defendant company a certificate from the principal of said school so attended by said George A. Altgelt, showing him to be entitled to such tickets, to-wit: a certificate signed and issued by J. B. Magruder, principal of said Magruder's school for boys, certifying that said George A. Altgelt is a regular scholar attendant upon said school; that he is under the age of seventeen years, and in regular attendance upon said school as aforesaid, and is in a grade thereof not higher than the grade of the public high schools of this State situated within and adjacent to said city of San Antonio. That said school is situated on Dallas street in said city of San Antonio, and the regular sessions for the term of A. D., 1903–1904 began on the 7th day of September, A. D., 1903, and will end on or about the 1st day of June, A. D., 1904.

Appellant's fifth special exception to said petition is as follows (Trans. p. 7):

"Fifth. It does not appear from said pleading that plaintiff is entitled to any right by reason of his attendance upon "Magruder's school for boys."

Said exception was presented to and overruled by the trial court and the court's action thereon duly excepted to, as shown by decree. (Trans. p. 18.)

83 Authorities.

General Laws, chap. CXVI p. 182.

Argument.

The court of civil appeals has disposed of this case upon the theory that the only question presented by the record herein is the constitutionality of the half-fare law. We respectfully urge, however, that the pleading and proof in this case wholly fail to show that defendant in error was a student in attendance upon the class of school covered by the half-fare law and for that reason was not entitled to a writ of mandamus as prayed for.

It will be observed that such half-fare is accorded "to students not more than 17 years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State." Clearly this language of the law is intended to describe the classes of schools whose students may procure the half-fare and evidences the desire and intention of the legislature to accord this privilege only to schools not graded higher than the public high schools of this State.

Furthermore, as appears from the title of the act, and from section 2 thereof, the express intention of the legislature is to confer this privilege only on "academic, public or private schools." An academic school or academy according to the accepted dictionaries in this country, being "a school holding the rank between a university or college and elementary schools." It is evident then, that if there had been no further limitation placed upon the grade of school by the language of the statute, the privilege would have been confined to students of schools between the rank of elementary schools and colleges. The legislature did not intend, however, to confer this privilege upon the students of academic schools which rank higher than the public free schools of this State; hence the further limitation that the academic schools should not be graded higher than the public high schools of this State.

The plaintiff in this case alleges he is a student in regular attendance upon Magruder's school for boys, but does not allege that such school is a public or private academic school of grades
84 not higher than the public high schools of this State. He does not, therefore, show that he has the right to obtain or that it is the duty of appellant to issue to him half-fare tickets, and his petition should be held insufficient upon the special exception interposed by appellant.

Fifth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant for the reason shown in appellant's tenth assignment or error because the trial court — in overruling defendant's sixth special

exception because if this proceeding be based upon chapter CXVI of the general laws of the 28th legislature of Texas, entitled "An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violation of this act" then this defendant specially excepts to this action, because said act of the legislature is unconstitutional and void as to this defendant, in that it is in violation of section 7 of article 10 of the constitution of this State, in that by it the legislature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the const-ution.

Statement.

Defendant's sixth special exception to plaintiff's petition (Trans. p. 7) is as follows:

"Sixth. If this proceeding be based upon chapter CXVI of the general laws of the 28th legislature of Texas, entitled 'An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons and providing penalties for violation of this act' then this defendant specially excepts to this
85 action because said act of the legislature is unconst-utional and void as to this defendant, in that it is in violation of section 7, of article 10, of the constitution of this State, in that by it the legislature seeks to exercise powers of which it is deprived and which are specially prohibited by said section of the constitution."

Said exception was presented to and overruled by the court and the court's action thereon duly excepted to as shown by decree. (Trans. p. 18.)

Authorities.

Const-ution of Texas, sec. 7, art. 10.
Mayor *v.* Houston Ry. Co. 83 Tex., 548.

Sixth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and here render judgment in favor of appellant for the reason shown in appellant's 11th assignment of error, because the trial court erred in overruling defendant's tenth special exception to plaintiff's petition, because said act is unconst-utional and void as to this defendant, because its enforcement is calculated to and will deprive this appellant of its revenues and property without compensation and without the due process of law.

Statement.

Defendant's tenth special exception to plaintiff's petition is as follows (Trans. p. 8):

"Tenth. Said act is unconst-utional and void as to this defendant because its enforcement is calculated to and will deprive this defendant of its revenues and property without compensation and without due process of law."

Said exception was presented to and overruled by the court, and the court's action thereon duly excepted to as shown by decree. (Trans. p. 18.)

Authorities.

City Water Co. *vs.* State, 88 Texas 600.
Detroit *vs.* City Ry. Co. 184 U. S. 369, Law ed. vol. 46, p. 610.
Const-ution of the United States, sec. 1, 14th amendment.
Const-ution of Texas, secs. 17 and 19, art. 1.

86 Argument.

Section 7, art. 10, of the const-ution of Texas, delegating, as it does, the right to the city authorities to prescribe the terms and conditions upon which its streets may be occupied by street railway corporation-, vests in the municipality the power to make a valid and subsisting contract with the street railway corporation-. The rights and privileges of a street railway company, including the right to charge a certain fare fixed by the municipality, constitute a part of its assets and property, and such corporation cannot be deprived thereof without due process of law and without compensation.

It appears from plaintiff's petition in this case that the appellant is a street railway corporation owning and operating electric street railways upon and over the streets of the city of San Antonio for the carriage of passengers at the regular rate of five cents per each ride, and it necessarily follows these allegations that appellant is occupying the streets of the city of San Antonio and charging such fare under and by virtue of a franchise from said city.

If the city of San Antonio had the right to fix the rate of fare, as we have contended under the preceding assignment of error then undoubtedly its grant of such right to appellant created a property right in appellant, and the act of the 28th legislature which seeks to deprive appellant of such right is an attempt to take its property without due process of law and without compensation therefor, and is unconst-utional.

Seventh.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant for the reasons shown in appellant's twelfth assignment of

error, because the trial court erred in overruling defendant's eleventh special exception to plaintiff's petition, because said act of the legislature is in violation of section 10, of art. 1, of the Const-ution of the United States, and of section 16, of article 1, of the constitution of Texas, and in violation of section 1 of the 14th amendment of the Constitution of the United States, and of section 17, of art. 1, of the constitution of Texas, because said act impairs the obligation
87 of the valid and subsisting contract existing between this defendant and the city of San Antonio and deprives this defendant of its property, without due process of law and without compensation therefor.

Statement.

Defendant's eleventh special exception to plaintiff's petition is as follows (Trans. p. 8):

"Eleventh. Said act of the legislature is in violation of section 10, of article 1, of the Constitution of the United States and of section 16, of article 1, of the constitution of Texas, and in violation of section 1 of the 14th amendment to the Constitution of the United States, and of section 17, of article 1 of the constitution of Texas, because said act impairs the obligation of the valid and subsisting contract existing between this defendant and the city of San Antonio and deprives this defendant of its property without due process of law and without compensation therefor."

Said exception was presented and overruled by the court and the court's action thereon duly excepted to as shown by decree (Trans. p. 18).

Authorities.

United States Constitution, sec. 10, art. 1.
United States Constitution, sec. 1, 14th amendment.
Texas constitution, sec. 16, art. 1.
City of Detroit *v.* City St. Ry. Co. 184 U. S. 369; 46 Law ed. p. 592.

Argument.

It is alleged in plaintiff's petition that defendant is a street railway corporation owning and operating a line of electric street railway upon and over the streets of the city of San Antonio and charging for transportation thereon the regular fare of five cents, and it necessarily follows from such allegation that appellant occupied the street- of said city and charged said fare for transportation upon its cars under and by virtue of its contract with the said city of San Antonio. If the power was delegated to the city of San Antonio by section 7, article 10, of the constitution of Texas, to fix the terms and conditions under which appellant might occupy its streets,
88 then the franchise from the city of San Antonio to appellant constituted a valid and subsisting contract between appellant and said city which could not be impared by the legislature pro-

viding that children under twelve years of age and students under the age of seventeen should be transported for one-half the regular fare which it was authorized to charge by its contract with the city, is an attempt to impair the obligation of such valid and subsisting contract and said act is therefore unconstitutional and void.

Eighth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and remand said cause for a new trial for the reasons shown in appellant's thirteenth assignment of error because the trial court erred in admitting evidence over defendant's objection the certificate of J. B. Magruder as shown by defendant- bill of exception No. 1.

Statement.

Defendant's bill of exception No. 1 is as follows: (Trans. p. 85).

"Be it remembered that upon a trial of the above entitled cause plaintiff offered in evidence the certificate of J. B. Magruder, principal of Magruder's school for boys, of which the following is a copy, to-wit:

STATE OF TEXAS, }
County of Bexar. }

In the City of San Antonio, Texas.

I, J. B. Magruder, principal of a private school in the city of San Antonio, Texas, known as Magruder's School for Boys, hereby certify that George A. Altgelt is a regular scholar attendant on said school; that he is under the age of seventeen years, in regular attendance upon such school, and is in a grade thereof not higher than the grades of the public high school of this State situated within or adjacent to the city of San Antonio.

I further certify that said Magruder's School for Boys, and which the said George A. Altgelt so attends, is situated on Dallas street in said city of San Antonio, and that its regular session for the term for A. D., 1903–1904, began on the 7th day of September
89 A. D. 1903, and ends on the 1st day of June, A. D. 1904.

Witness my signature on this 19th day of September, A. D., 1903.

(S'd) J. B. MAGRUDER,
Principal Magruder School for Boys.

To the introduction of which said certificate defendant objected, because the same does not show that Magruder's School for Boys is an academic, public or private school, and because the said certificate does not show that the Magruder's School for Boys has no grades in it higher than the grades of the public high schools of this State, and because it is not shown that defendant knew or was noti-

fied in any way that said school was of such character as described in the statute, which said objections were overruled by the court and the said certificate admitted in evidence, to which action and ruling of the court defendant then and there in open court excepted and tenders this its bill of exceptions No. 1, and asks that they be signed filed and made a part of the record herein, which is accordingly done.

JOHN H. CLARK, Judge."

Authorities.

General Laws of 1903, chapter CXVI p. 182.

Ninth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and remand said cause for a new trial for the reasons shown in appellant's fourteenth assignment of error, because the trial court erred in admitting in evidence the testimony of plaintiff's witness, George C. Altgelt, as shown by defendant's bill of exceptions No. 2.

Statement.

Defendant's bill of exception No. 2 is as follows: (Trans. p. 37)

"Be it remembered that upon the trial of the above entitled cause the following proceedings were had:

While plaintiff's witness, George C. Altgelt, was testifying for plaintiff on direct examination, plaintiff's counsel asked the witness the following question:

Q. Do you know of what,—know what kind of school, what
90 grade, what class of school, what it would be called?

To which question the defendant objected because there is no allegation in the petition herein *the* the defendant knew or was notified in any way that the school which George A. Altgelt attended was of such character as described in the statute.

Whereupon plaintiff's counsel asked the witness the following questions, and the witness was thereupon permitted to testify as follows, over the objections of the defendant as hereinbefore set out duly urged to each of said questions and answers, and the court's action in admitting said evidence excepted to at the time:

Q. Is it a private or public school?
A. Private school, paid tuition.
Q. Do you know about the branches taught there?
A. I would call it a grammer school.
Q. Do you know about the studies your boy has there?
—. ——.
Q. I will ask the witness if he is acquainted with the studies of Geo. A. Altgelt, and what they are?
A. Yes sir.

Q. What are those studies?
A. They are strictly elementary.
Q. Could you name those studies.
A. Yes.
Q. I will ask you to name them?
A. Reading, writing, arithmetic, geography and spelling.
Q. State if you know if he is in about the same grade boys of his age generally are?

To which actions and rulings of the court in admitting the testimony hereinbefore set out over the objections hereinbefore stated and urged to all of said testimony, defendant's counsel duly excepted and tenders this its bill of exceptions No. 2, and asks that the same be signed, filed and made a part of the record herein, which is accordingly done.

JOHN H. CLARK, Judge."

Authorities.

General Laws, 1903, chapter CXVI, p. 182.

91 Tenth.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant for the reasons shown in appellant's fifteenth assignment of error because the trial court erred in holding that the city could not make a binding contract fixing such limitations as it might deem best, upon its consent to defendant to operate in the streets of the city of San Antonio.

Eleventh.

The court of civil appeals erred in refusing to reverse the judgment of the trial court herein and render judgment in favor of appellant because the trial court erred in holding that the State had the right reserved to it to fix the rates of fare on defendant's lines and the right to change rates of fare fixed by the city of San Antonio.

Statement.

The San Antonio Street Railway Company was chartered by special act of the legislature, May 2nd, 1874, prior to the adoption of the present constitution, and sections 8 and 9 of said special charter provided (Trans. p. 22):

"Sec. 8. That all contracts made or entered into by and between the mayor and aldermen of the city of San Antonio and the said company of any privileges or rights granted by the said mayor and aldermen of the city of San Antonio to the said company shall be in all respects legal and binding on the aforesaid contracting parties.

SEC. 9. This charter shall remain in full force and effect for the period of fifty years."

Under said charter, the city of San Antonio, by ordinance of October 5th, 1875 (Trans. pp. 25 and 26) granted right-of-way and certain privileges to said company, and later, on 16th of March, 1899, by ordinance agreed to and accepted by the street railway company, provided that it should charge *five cents fare for one continuous* ride over any of its lines with one transfer to or from either line to the other (Trans. pp. 26 and 27) with privilege of assignment of the franchises or either of them granted by said ordinance (Trans. *ib.*).

The rights, privileges and franchises granted by said ordi-
92 nance were assigned through mesne conveyances and court orders to and were acquired by appellant (Trans. p. 27, 28 and 29) and on the 7th day of August, 1900 (Trans. pp. 29 and 30) were confirmed in and granted to and accepted by appellant, and on January 7th, 1901 (Trans. pp. 30 and 31). The same were extended by the city over River avenue in said city.

Authorities.

Constitution of Texas, sec. 7, art. 10.
Mayor *vs.* Houston Ry. Co., 83 Texas 548.

Argument.

The legislature has the right to charter the San Antonio Street Railway Company by special charter and to authorize it to contract with the city of San Antonio during the period of its charter (fifty years from May 2nd, 1874) and under such charter the San Antonio Street Railway Company acquired the right from the city to charge five cents fares on its lines of road. Subsequent to the passage of said charter the present constitution was adopted requiring the legislature to pass general laws for the forming of private corporations and providing for the supervision and regulation of such as were to be formed under such general laws. In the constitution under the title of "Railroads" (Article 10), it is provided in section 7, that the legislature shall not have control of the question of the right of a street railway corporation to operate in a municipality, and that the municipal authorities shall alone exercise this power, and it necessarily carries with it the power to the municipality to dictate the terms upon which its consent shall be given. It must therefore be held that the terms and conditions imposed and the rights granted by the municipal government constitute a contract with the street railway corporation.

Wherefore, we submit that the court of civil appeals of the fourth judicial district of Texas, has erred as in this application specified, and plaintiff in error prays the supreme court of Texas to grant a writ of error herein and upon hearing hereof to correct said errors, reverse the judgment of the district court and court of civil appeals

and here render judgment for plaintiff in error or remand this cause for a new trial and render judgment in favor of plaintiff in error for all costs.

93 HOUSTON BROS.,
R. J. BOYLE,
Attorneys for Plaintiff in Error,
San Antonio Traction Co.

Endorsement: App. No. 4332. In the supreme court of the State of Texas. San Antonio Traction Co., plaintiff on error, *vs.* Geo. A. Altgelt, defendant in error. Application for writ of error to the court of civil appeals fourth supreme judicial district of Texas at San Antonio. Filed in the court of civil appeals at San Antonio, Texas, Jun- 29 1904. H. E. Hildebrand, clerk.
Filed in supreme court July 14th, 1904.
F. T. CONNERLY, Clerk,
By J. S. MYRICK, Deputy.

Refused.

Clerk's Office, Supreme Court.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the foregoing twenty-two pages contain a true and correct copy of the petition for writ of error, of the applicant the San Antonio Traction Company, in application No, 4332, San Antonio Traction Company, plaintiff in error *vs.* Geo. A. Altgelt, defendant in error. I further certify that an application for writ of error in said cause was refused by the supreme court of Texas on the 6th day of October, 1904, as appears of record.
Witness my hand and the seal *of the seal* of the supreme court of Texas, at the city of Austin, this the 14th day of November A. D. 1904.
[SEAL.] F. T. CONNERLY, Clerk.

Endorsement: App. No. 4332, San Antonio Traction Co., *vs.* Geo. A. Altgelt. Certified copy of petition for writ of error.

Judgment of Supreme Court of Texas.

In Supreme Court of Texas, Fourth District.

SAN ANTONIO TRACTION CO.
vs.
GEORGE A. ALTGELT.

94 October 6th, 1904.—This day came on to be heard the application of San Antonio Traction Company for a writ of error to the court of civil appeals for the fourth district, and the same having been duly considered, it is ordered that said applica-

tion be refused; that the applicant San Antonio Traction Company and its sureties A. W. Houston and Reagan Houston pay all costs incurred on this application.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the supreme court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court, this the 26th day of October A. D., 1904.

[SEAL.] F. T. CONNERLY, Clerk,
By J. S. MYRICK, Deputy.

Motion for rehearing overruled Oct. 24th, 1904.

Endorsement: Application No. 4332, San Antonio Traction Company, *vs.* George A. Altgelt, Copy of judgment in supreme court, Application for writ of error refused, Filed in the court of civil appeals at San Antonio, Texas, October 27th, 1904. H. E. Hildebrand, clerk.

Petition for Writ of Error.

In the Supreme Court of the United States, October Term, A. D. 1904.

SAN ANTONIO TRACTION COMPANY, Plaintiff in Error,
vs.
GEORGE A. ALTGELT, Suing by Next Friend, GEO. C. ALTGELT, Defendant in Error.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the associate justices of said court:

Now comes The San Antonio Traction Company, plaintiff in error in the above cause and would show unto this honorable court that by the judgment of the district court, 37th judicial — Bexar county, Texas, entered on the 29th day of October, 1903, and by the
95 judgment of the court of civil appeals of the fourth supreme judicial district of the State of Texas, affirming said judgment of said district court on May 4th, 1904, and by the refusal of the supreme court of the State of Texas by its judgment dated October 6th, 1904, to grant to plaintiff in error a writ of error in said cause thereby making the judgment of the said court of civil appeals final, manifest error has occurred, greatly to its damage whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of a statute of said State of Texas on the ground of repugnancy to the Constitution of the United States in this: That the act of the 28th legislature of Texas, chapter CXVI

general laws of Texas, 1903, regulating street railway fare in certain cities and towns is in contravention of section 10, article 1, of the Constitution of the United States and of section 1, of the 14th amendment to the Constitution of the United States in that it impairs the obligation of a valid and subsisting contract between the city of San Antonio, Texas, and the San Antonio Traction Company, plaintiff in error, and deprives said company of its property and revenues without due process of law and without compensation and denies to said company the equal protection of the law, and the decision was in favor of the validity of said State law, said State law being in terms as follows:

Street Railway—Regulating Fare in Certain Cities and Towns—Chapter CXVI.

An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violation of this act.

Section 1. Be it enacted by the legislature of the State Texas: All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of the age of twelve years or less at and for one-half the charge or fare regularly collected by such person or corporation for the
96 transportation of adult persons; provided, that this act shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run.

Section 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year

when such schools are in actual session, and such students shal be transported at half fare only upon the presentation of such tickets.

SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a pasenger of above said age, free of charge.

SEC. 4. All such persons or corporations are required to accorl to all passengers referred to in sections 1, 2 and 3 of this act the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.

SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty five nor more than one hundred dollars.

SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein
97 provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.

SEC. 7. The fact *the* there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended.

All of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that its appeal be allowed that this court fix the amount of the bond to be given by plaintiff in error, which may operate as a supersedeas, and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of said court in such cases made and provided that the same may be inspected and corrected as according to law and justice should be done.

A. W. HOUSTON,
Att'y for San Antonio Traction Co., Plaintiff in Error.

Writ of error allowed, with supersedeas upon the San Antonio Traction Company, plaintiff in error, giving bond according to law, in the sum of five hundred dollars, Nov. 25th, 1904.

JOHN H. JAMES,
Chief Justice Court of Civil Appeals, Fourth
Supreme Judicial District of Texas.

Endorsement: San Antonio Traction Company, plaintiff in error *vs.* George A. Altgelt defendant in error. Petition for writ of error. Filed in the court of civil appeals, at San Antonio, Texas, Nov. 25th, 1904, H. E. Hildebrand, clerk.

Writ of Error Bond.

Know all men by these presents, that we, San Antonio Traction Company, as principal and L. Heuermann and J. J. King as sureties, are held and firmly bound unto George A. Altgelt, suing herein by his next friend George C. Altgelt, in the full and just sum of
98 five hundred ($500.00) dollars, to be paid to the said George A. Altgelt, suing herein by his next friend George C. Altgelt, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of November, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the court of civil appeals for the fourth supreme judicial district of Texas, sitting at San Antonio in a suit depending in said court, between San Antonio Traction Company, appellant, and George A. Altgelt, suing herein by his next friend, George C. Altgelt, appellee a judgment was rendered against the said San Antonio Traction Company which said judgment became final on October 6th, 1904, by reason of the refusal of the supreme court of the State of Texas on said date to grant the said San Antonio Traction Company a writ of error in said cause and the said San Antonio Traction Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George A. Altgelt, suing herein by his next friend, George C. Altgelt, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said San Antonio Traction Company shall prosecute its writ of error to effect, and answer all damage and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SAN ANTONIO TRACTION COMPANY,
By A. W. HOUSTON, Att'y. [SEAL.]
L. HEUERMANN. [SEAL.]
J. J. KING. [SEAL.]

Sealed and delivered in presence of:
J. R. DAVIS.
NELSON LYTLE.
R. J. BOYLE.

Approved by—
J. H. JAMES,
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

99 Endorsement: San Antonio Traction Company, plaintiff in error *vs.* George A. Altgelt, suing by next friend Geo. C. Altgelt, defendant in error. Writ of error bond. Filed in the court of civil appeals at San Antonio, Texas, Nov. 25, 1904. H. E. Hildebrand, clerk.

Assignments of Error.

In the Supreme Court of the United States, October Term, 1904.

SAN ANTONIO TRACTION COMPANY, Plaintiff in Error,
vs.
GEORGE A. ALTGELT, Suing by Next Friend, GEORGE C. ALTgelt, Defendant in Error.

In the above styled and numbered cause, comes the San Antonio Traction Company, by its attorneys, and says that the honorable court of civil appeals for the fourth supreme judicial district of Texas in affirming the judgment of the district court for the 37th judicial district of Bexar county, Texas, has committed errors in its opinion and judgment prejudicial and unjust to The San Antonio Traction Company, plaintiff in error, in this:

First.

The court of civil appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit: the act of the twenty-eighth legislature of the State of Texas, regular session of 1903, chapter CXVI, regulating street railway fares in certain cities and towns, said act being as follows, to-wit:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of
100 twelve years and all students not more than seventeen years of age attending any public or private academic school at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act.

SECTION 1. Be it enacted by the legislature of the State of Texas: All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of the age of twelve years or less at and for one-half the charge or fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this act shall not apply to street cars carrying children or students to and from schools, colleges, or other

institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run."

'SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used ex-ept during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.'

'SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a
101 passenger of above said age, free of charge."

SEC. 4. All such persons or corporations are required to accord to all passengers referred to in sections 1, 2 and 3 of this act, the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.'

SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor and fined not less than twenty-five nor more than one hundred dollars.'

'SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.

'SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded -ondition of the calendar and the near approach of the end of the session creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended."

and specially the second section of said act — valid and not in -onflict with the Constitution of the United States, because the said statute impairs the obligation of a valid and subsisting contract between the city of San Antonio and the San Antonio Traction Company, entered into prior to the passage of said act and deprived said

San Antonio Traction Company of its property and revenue without due process of law and without compensation and denies said company the equal protection of the law, in violation of the Constitution of the United States.

Second.

The court of civil appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit: the act of the 28th legislature of the State of Texas, regular session of 1903, chapter CXVI regulating street railway fares in certain cities and towns, said act being as follows, to-wit:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve years, and all students not more than seventeen years of
102 age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act.

'SECTION 1. Be it enacted by the legislature of the State of Texas. All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of the age of twelve years or less at and for one-half the charge of fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this act shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run."

'SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which said street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students and shall not be used except during the months of the year when such schools are in actual session, and such students shall be

transported at half fare only upon the presentation of such ti-kets.'

'SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge.'

103 'SEC. 4. All such persons or corporations are required to ac-ord to all passengers referred to in sections 1, 2, and 3 of this act, the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.'

'SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars.

'SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor and be fined not less than twenty-five nor more than one hundred dollars.'

'SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session creates an emergency and an imparative public necessity that the constitutional rules requiring bills to be read on three several days be suspended, and the same is hereby suspended.'

and especially the second section of said act, valid and not in conflict with nor in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, because said statute of the State of Texas, impairs the obligation of a valid and subsisting contract between the San Antonio Traction Company, plaintiff in error and the city of San Antonio, Texas, entered into prior to the passage of said act, contrary to the provisions of said paragraph 1, section 10 of article 1 of the Constitution of the United States.

Third.

The court of civil appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit: the act of the 28th legislature of the State of Texas, regular session of 1903, chapter CXVI, regulating street railway fares in certain cities and towns, said act being as follows, to-wit:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of
104 twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violation of this act.

'SECTION 1. Be it enacted by the legislature of the State of Texas: All persons or corporations owning or operating street railways in

or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of the age of twelve years or less at and for one-half the charge or fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this act shall not apply to street cars carrying children or students to and from schools, colleges or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said car runs.'

'SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such ticket- are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.'

'SEC 3. All such persons or corporations are required to transport children of the age of five years or less, when attended
105 by a passenger of above said age, free of charge.

'SEC. 4. All such persons or corporations are required to accord to all passengers referred to in sections 1, 2 and 3 of this act, the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.'

'SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor and fined not less than twenty-five nor more than one hundred dollars.'

'SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less then twenty-five nor more than one hundred dollars.

'SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session creates an emergency and an imperative public necessity that the constitutional rule re-

quiring bills to be read on three several days be suspended, and the same is hereby suspended.'

valid and not in conflict with nor in violation of section 1 of the fourteenth amendment to the Constitution of the United States, because said act deprives the San Antonio Traction Company, plaintiff in error, of property vested in it by contract entered into between the San Antonio Traction Company and the city of San Antonio, Texas, prior to the passage of said act, without due process of law, contrary to said section 1, of the fourteenth amendment to the Constitution of the United States.'

Fourth.

The court of civil appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit: the act of the twenty-eighth legislature of the State of Texas, regular session of 1903, chapter CXVI, regulating street railway fares in certain cities or towns, said act being as follows: to-wit:

"An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of
106 twelve years, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons; and providing penalties for violations of this act

'SECTION 1. Be it enacted by the legislature of the State of Texas: All persons or corporations owning or operating street railways in or upon the public streets of any town or city in this State of not less than 40,000 inhabitants are required to carry children of the age of twelve years or less at and for one-half the charge of fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this act shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run.'

'SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance,

showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets.'

'SEC. 3. All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge.'

107 'SEC. 4. All such persons or corporations are required to accord to all passengers referred to in section 1, 2 and 3, of this act the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare.'

'SEC. 5. Any officer of any corporation or other person who shall knowingly violate any of the provisions of this act shall upon conviction be adjudged guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars.'

'SEC. 6. Any person who shall misrepresent the age or the grade of any person for the purpose of securing the reduced fare herein provided for shall upon conviction be adjudged guilty of a misdemeanor, and be fined not less than twenty-five nor more than one hundred dollars.'

'SEC. 7. The fact that there is now no law requiring street railways to carry children at half fare, the crowded condition of the calendar and the near approach of the end of the session, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended.'

valid and not in conflict with or in violation of section 1 of the fourteenth amendment to the Constitution of the United States, because said statute of the State of Texas denies to the San Antonio Traction Company the equal protection of the law guaranteed to it by section 1 of the fourteenth amendment to the Constitution of the United States.

Wherefore, the said plaintiff in error prays that the judgment of said court be reversed and such directions be given that full force and efficacy may inure to plaintiff in error by reason of the defences set up in his pleadings filed in said case.

A. W. HOUSTON,
Attorney for Plaintiff in Error,
San Antonio Traction Company.

Endorsements: San Antonio Traction Company, plaintiff in error, *vs.* George A. Altgelt, defendant in error. Assignments of error. Filed in the court of civil appeals, at San Antonio, Texas November 25th, 1904. H. E. Hildebrand, clerk.

108 Bill of Costs in Court of Civil Appeals.

SAN ANTONIO TRACTION COMPANY, Appellant,
vs.
GEORGE A. ALTGELT, Appellee. } No. 3003.

Filing	$ .50
Docketing cause	.50
Appearances	1.00
Filing briefs and other papers	2.80
Notices	4.50
Orders	2.00
Judgment	1.00
Recording opinion	5.00
Certificate and seal	.50
Taxing costs	.50
Certified copy bill of costs	1.00
Filing and docketing motion	.35
Transcript to supreme court of Texas	1.50
Express charges	.50
Costs in supreme court of Texas	8.05
Issuing writ of error	1.00
Affidavit	.25
Filing 5 extra papers	.50
Transcript to Supreme Court of U. S.	56.00
Total	$87.45

109 Certificate of Transcript.

STATE OF TEXAS,
Fourth Supreme Judicial District.

I, H. E. Hildebrand, clerk of the court of civil appeals in and for the fourth supreme judicial district of Texas, by virtue of the foregoing writ of error and in obedience thereto do hereby certify that the foregoing pages numbered from 1 to 108 inclusive contain a true and complete transcript of the record and proceedings had in said court in the cause of San Antonio Traction Company, appellant, *vs.* George A. Altgelt, appellee, and numbered in this court No. 3003 as the same remains of record and on file in said office, the original writ of error and citation in error being hereto attached.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of San Antonio in the fourth supreme judicial district of Texas, this the 26th day of November A. D. 1904.

[Seal Court of Civil Appeals of the State of Texas.]

H. E. HILDEBRAND,
Clerk Court of Civil Appeals in and for the
Fourth Supreme Judicial District of Texas.

110 UNITED STATES OF AMERICA, *ss:*

To George A. Altgelt, suing herein by his next friend, George C. Altgelt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the court of civil appeals for the fourth supreme judicial district of the State of Texas wherein San Antonio Traction Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. H. James chief justice of the said court of civil appeals, this 25th day of November, in the year of our Lord one thousand nine hundred and four.

J. H. JAMES,
Chief Justice of the Court of Civil Appeals, Fourth
Supreme Judicial District of the State of Texas.

111 On this 25th day of November, in the year of our Lord one thousand nine hundred and four, personally appeared R. J. Boyle before me, the subscriber, H. E. Hildebrand, clerk of the court of civil appeals in and for the 4th supreme judicial district of Texas, and makes oath that he delivered a true copy of the within citation to August E. Altgelt attorney of record of George A. Altgelt suing herein by his next friend George C. Altgelt.

R. J. BOYLE.

Sworn to and subscribed this 25th day of November, A. D. 1904.

[Seal Court of Civil Appeals of the State of Texas.]

H. E. HILDEBRAND.
Clerk Court Civil Appeals in and for the 4th
Supreme Judicial District of Texas.

Filed in the court of civil appeals, at San Antonio, Texas, Nov. 25 1904.

H. E. HILDEBRAND, Clerk.

112 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America, to the honorable the judges of the court of civil appeals for the fourth supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals before you, or some of you being the highest court of law or equity of the said State in which a decision could be had in the said suit between San Antonio Traction Company, appellant, and George A. Altgelt suing herein by his next friend George C. Altgelt, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
113 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of November, in the year of our Lord one thousand nine hundred and four.

[The Seal of the U. S. Circuit Court, Western Dist., Texas.]

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas,
By A. GROSENBACHER, Deputy

Allowed by—
J. H. JAMES,
Chief Justice of the Court of Civil Appeals
Fourth Supreme Judicial District of the
State of Texas.

114 [Endorsed:] No. —. S. A. Traction Co., pl'ff in error, *vs.* George A. Altgelt, def't in error. Writ of error. Filed in the court of civil appeals, at San Antonio, Texas. Nov. 25, 1904. H. E. Hildebrand, clerk.

115 [Endorsed:] No. 1—. From court of civil appeals, fourth supreme judicial district of Texas, San Antonio. San Antonio Traction Co., plaintiff in error, *vs.* George A. Altgelt, defendant in error. Transcript. H. E. Hildebrand, clerk.

Endorsed on cover: File No. 19,546. Texas court of civil appeals, 4th sup. judicial district. Term No. 131. San Antonio Traction Company, plaintiff in error, *vs.* George A. Altgelt, suing herein by his next friend, George C. Altgelt. Filed December 3d, 1904. File No. 19,546.

FILE COPY.

In the Supreme Court U. S.
FILED
DEC 2 1905
JAMES H. McKENNEY, Clerk.

No. 131

IN THE

Supreme Court of the United States.

SAN ANTONIO TRACTION COMPANY, PLAINTIFF IN ERROR.

vs.

GEORGE A. ALTGELT, SUING HEREIN BY HIS NEXT FRIEND, GEORGE C. ALTGELT.

Writ of Error from the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. OGDEN,
Att'y for Plaintiff in Error.

GUSSETT & FERLET, PRINTERS, SAN ANTONIO.

No. 131

IN THE

Supreme Court of the United States

SAN ANTONIO TRACTION COMPANY, PLAINTIFF IN ERROR.

vs.

GEORGE A. ALTGELT, SUING HEREIN BY HIS NEXT FRIEND, GEORGE C. ALTGELT.

Writ of Error from the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Geo. A. Altgelt suing by his next friend Geo. C. Altgelt filed a petition in the State District Court of Bexar County, Texas, on December 23rd, 1903, seeking peremptory mandamus against the plaintiff in error, the San Antonio Traction Company, commanding it to issue to the plaintiff in the petition twenty (20) half fare street car tickets upon the payment of the sum of fifty cents. ($.50,) or at the rate of two and one half cents per ticket. The San Antonio Traction Company is a corporation organized under the laws of the State of Texas, owning and operating a system of street railway in the City of San Antonio, Texas.

The plaintiff in petition for mandamus must rely, in order to sustain his claim of right to purchase the half fare tickets at the price above named, upon an act of the Legislature of the State of Texas approved April 3rd, 1903. The only portion of this Act which is necessary for the decision of this case is contained in Section 2, which reads as follows:

> "All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grade hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets."

It will be admitted for all the purposes of the question which will be presented to this court for decision that the plaintiff in the State Court made the necessary allegations of facts to bring him within the provisions of the Act above referred to. He claims that under the provisions of that section of the Act he, as a student attending the school of a grade and character bringing it within the provisions of the law, is entitled to purchase the half-fare tickets upon which to ride from his home to Magru-

der's School, which he attends, on the electric street cars of the San Antonio Traction Company over the public streets of the City of San Antonio, Texas, by the way of River Avenue, Grand Avenue, Austin Street, Tenth Street and Avenue C., and over each of said streets it is alleged that a system of street railway is operated by the San Antonio Traction Company.

The validity of this Act, in so far as it was sought to be enforced against the plaintiff in error, was drawn in question onthe ground that it was repugnant to Sec. 10, Art. 1 of the Constitution of the United States and of Sec. 1 of the 14th Amendment to the Constitution of the United States in that it impairs, if enforced against the San Antonio Traction Company, the obligation of a valid and subsisting contract between the City of San Antonio, Texas, and the San Antonio Traction Company and deprives said Company of its revenues and property wihout due process of law and without compensation and denies to the said Company the equal protection of the law.

The San Antonio Traction Company in its defensive pleading filed in the State District Court plead among other things the following:

> "5th. Should the defendant be held to further answer then specially answering, it says that heretofore, to-wit; on the 2nd day of May, 1874, the San Antonio Street Railway Company was chartered by special act of the legislature of the State of Texas, and that section 8 of said act reads as follows:
>
> 'That all contracts made or entered into by and between the mayor and aldermen of the city of San Antonio and said company, or any privileges or rights granted by said mayor and aldermen of the city of San Antonio to the said company, shall be in all respects, legal and binding on the aforesaid contracting parties.
>
> That on October 5th, 1875, the city of San Antonio by an ordinance granted to the said San Antonio Street Railway Company, with certain conditions and limitations the right to construct and operate its street railway lines on the streets, alleys and plazas of the

city of San Antonio That in said ordinance no provision was made requiring said company to do any part of the street paving or improvement of the streets of the city occupied by its lines and that no transfers from one line to another were required. Subsequently, on the 16th day of March, 1899, the city council of the city of San Antonio extended the term of said company's franchise, imposing upon it additional burdens and limitations in consideration of its extension, among others, enacting that it should do certain parts of the street improvements upon the streets occupied by it and fixing rate of fares which should be charged as well as the transfers which should be granted by the Company to its passengers, a copy of which provision is as follows:

'4th. Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails and all the space between the double tracks, and twelve (12) inches on the outside of their tracks, on any street occupied by them or either of them which shall hereafter be paved by the city, as and when the city paves, and with the same material as used by the city and shall keep the same in reasonable repair and in like condition as the city keeps adjoining streets.

'That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.

'Section 2. The rights, privileges and franchises, or either of them herein referred to and hereby extended may be assigned by the grantee or grantees to any person or corporation, but the condition and limitations of this ordinance shall apply to the assignee thereof.'

'That subsequently, the defendant San Antonio Traction Company lawfully acquired all of the property rights and franchises and assumed all the duties and obligations of the San Antonio Street Railway Com-

pany under said ordinance and contract with the city of San Antonio and on the 7th day of August, 1900, all said rights, privileges and franchises contained in said ordinance granted to the San Antonio Street Railway Company were confirmed to the present company, imposing upon it likewise all the burdens, obligations and limitations of said ordinance. The terms of said ordinance and franchise were duly accepted according to the provisions thereof by this defendant company, which now operates thereunder something over forty miles of railway in the city of San Antonio, and under said ordinance and contract has paid large sums of money towards street paving and improvements, under the requirements and terms thereof.

Wherefore this defendant says that it has a lawful and binding contract with the city of San Antonio, by which it has the contract right to charge the sum of five cents for each passenger riding upon its lines and avers that the plaintiff is proceeding herein under an act of the legislature, entitled, 'An act requiring all persons or corporations owning or operating street railways in any of the cities of this State of not less than 40,000 inhabitants to transport children under the age of twelve, and all students not more than seventeen years of age attending any public or private academic school, at and for one-half the fare regularly charged for the transportation of adult persons, and providing penalties for violations of this act,' being chapter CXVI of the General Laws of the 28th Legislature, page 182 and this defendant says that said act of the egislature is unconstitutional and void as to this defendant, because the same is in violation and contravention to of section 10 of article 1 of the Constitution of the United States and of section 16 of article 1 of the constitution of Texas, in that it impairs the obligation of said lawful, valid and subsisting contract existing between this defendant and the city of San Antonio; and said act is in violation of Section 1 of the Fourteenth amendment to the Constitution of the United States and

of section 17, article 1 of the constitution of Texas, because said act deprives this defendant of its property and revenues without due process of law and without compensation therefor." ("Tr. pp. 7 and 8.)

In a supplementary petition filed by the plaintiff in the court below (Tr. pp. 10 & 11,) it is alleged that the portion of the San Antonio Traction Company which operated on and over River and Grand Avenues was not acquired by the San Antonio Traction Company from or under the San Antonio Street Railway Co., its assigns. This allegation involves the admission that the portion of the San Antonio Traction Company which is operated on and over Austin Street, Tenth Street and Avenue C., and over all of which streets the plaintiff, in the court below, claimed the right to ride on half fare tickets, was acquired by the San Antonio Traction Company from the San Antonio Street Railway Company.

Upon the trial of the case this plaintiff in error introduced in evidence the charter of the San Antonio Street Railway Company by special act of the legislature of the State of Texas of date May 2nd, 1874. (Tr. p. 15.) Also an ordinance dated Oct. 5th, 1875, of the city of San Antonio, granting a right of way to the San Antonio Street Railway Company with a right of way for its street railway system over the streets of the City of San Antonio. This ordinance contains no provision as to the fares to be charged by the San Antonio Street Railway Company. It imposes no burdens upon the said company for street improvements, but provides simply that in constructing the road bed of the street railway the same shall be made to conform to the grade of the streets as prescribed by the City Engineer and that the road bed shall be kept in good condition so as not to interfere with or obstruct the passage of vehicles or travel or pedestrians. Also an ordinance dated March 16th, 1899, granting an extension of the time of the rights, privileges and franchises of the San Antonio Street Railway Company and the San Antonio Edison Company with other public utility corporations, not material to this case, and fixing a date at which the rights, privileges and franchises should expire. (Tr. pp. 17 and 18.)

This ordinance provided that after its acceptance by the

said companies, they should pave so much of the streets upon which they operated their street car systems as is situated between the rails and all the space between double tracks and a space of 12 inches on the outside of the tracks, with such material and in whatever manner the city might pave the other portion of the streets, and further provides that the said companies shall keep the portion of the streets so occupied by them in reasonable repair and in like condition as the city keeps its portion of the same street. This ordinance provides that the said San Antonio Street Railway Company shall charge five cents fare for one continuous passage over one of the lines with one transfer from either line to the other. This ordinance further provides that said rights, privileges and franchises therein conferred may be assigned by the grantee or grantees to any person or corporation. The ordinance further contains the provisions that an acceptance of its terms and conditions shall be filed with the City Clerk by the respective companies.

Also conveyances showing that all the estates, property, rights, privileges, accounts, claims and choses in action, being all the property of every nature whatsoever heretofore belonging to the San Antonio Street Railway Company had passed by assignment from the said company through a court receiver to W. F. Douthirt on the 4th day of April, 1900, and on the same day was by him conveyed and assigned to the San Antonio Traction Company, plaintiff in error herein. Also an ordinance of the City of San Antonio, dated August 7th, 1900 containing among other provisions the following:

> "That all the rights and privileges heretofore granted by the City of San Antonio to the San Antonio Street Railway Company and to the San Antonio Edison Company be and the same are hereby confirmed to the San Antonio Traction Company and all of the limitations, duties, contracts and obligations imposed upon and required of the said San Antonio Street Railway Company or the said San Antonio Edison Company by the aforesaid ordinance of March 16th, 1899 or any other valid ordinance now in force at the time of the acquisition of the property of the said two

companies by the said San Antonio Traction Company shall be and the same are hereby imposed upon the said San Antonio Traction Company and that the said San Antonio Traction Company shall, within three days from the passage of this ordinance file with the City Clerk written acceptance of the terms thereof."

Also a conveyance from the Grand Ave. Railway Company to the San Antonio Traction Company dated February 20th, 1901, conveying the street car line situated on Grand Avenue. (Tr. p. 19.) Also an ordinance of the City of San Antonio dated June 7th, 1901, granting to the San Antonio Traction Company the privilege to construct and own its line of railway with the necessary tracks along Grand and River Avenues, connecting the same with the San Antonio Traction Company's tracks on Austin Street. This ordinance provides that the rights, privileges and franchises to be granted are subject to the limitations and the duties imposed by the ordinance of the City of San Antonio, and by the ordinance granting a franchise and right to the said San Antonio Traction Company over other streets in the City of San Antonio, and is for the term of the franchise for which the said San Antonio Traction Company now has and enjoys the privileges for its principal lines heretofore constructed and now owned and operated by it within the said city. The ordinance further provides that transfers shall be given on the lines here granted to all lines over the city owned by the San Antonio Traction Company and connecting therewith. (Tr. p. 20.) It was admitted in the trial court that all these ordinances had been accepted in due form by the San Antonio Traction Company. (Tr. p. 20.)

(Note:—The special act of the Legislature of the State of Texas, incorporating the San Antonio Street Railway Company and the pertinent portions of the ordinances above referred to are printed in full in an appendix to this brief.)

The decision of the trial court was in favor of the validity of the state law and the writ of mandamus was awarded. (Tr. p. 12.) An appeal was prosecuted to the Court of Civil Appeals for the 4th Supreme Judicial District of Texas, where the judgment of the District Court was affirmed, and in the opinion handed down by that court it was held that the act of the legislature the

validity of which was in issue, was valid and enforcable against the San Antonio Traction Co. and that no obligation of any contract between the City of San Antonio and the said San Antonio Traction Company was in any way impaired by the act of the legislature in question or by its enforcement against the said San Antonio Traction Company. (Tr. pp. 39 and 41.)

Motion for rehearing filed by the San Antonio Traction Company in the Court of Civil Appeals was overruled. (Tr. p. 58) Whereupon an application for a writ of error was made to the Supreme Court of the State of Texas. (Tr. p. 58.) which was refused, (Tr. p. 76.) Whereupon a writ of error was sued out in this Court.

ASSIGNMENT OF ERRORS.

I

The Court of Civil Appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas to-wit; the act of the twenty-eighth legislature of the State of Texas, regular session of 1903, chapter CXVI regulating street railway fares in certain cities and towns, said act being as follows: (Here follows a full copy of the Act for which see appendix.) and specially the second section of said act valid and not in conflict with the Constitution of the United because the said statute impairs the obligation of a valid and subsisting contract between the City of San Antonio and the San Antonio Traction Company, entered into prior to the passage of said act and deprived said San Antonio Traction Company of its property and revenue without due process of law, and without compensation and denies said company the equal protection of the laws in violation of the Constitution of the United States.

The Court of Civil Appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit the act of the 28th legislature of the State of Texas, regular session of 1903, chapter CXVI regulating street railway fares in certain cities and towns, said act being as follows: (Here follows full copy of the Act for which see appendix,) and especially the second section of said act, valid and not in conflict

with nor in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, because said statute of the State of Texas, impairs the obligation of a valid and subsisting contract between the San Antonio Traction Company, plaintiff in error and the city of San Antonio, Texas, entered into prior to the passage of said act, contrary to the provisions of said paragraph 1, section 10, of article 1 of the Constitution of the United States.

III

The Court of Civil Appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit, the act of the 28th legislature of the State of Texas, regular session of 1903, chapter CXVI regulating street railway fares in certain cities and towns, said act being as follows. (Here follows full copy of act for which see appendix,) valid and not in conflict with nor in violation of section 1 of the fourteenth amendment to the Constitution of the United States because said act deprives the San Antonio Traction Company, plaintiff in error,of property vested in it by contract entered into between the San Antonio Traction Company and the City of San Antonio, Texas, prior to the passage of said act, without due process of law, contrary to said section 1 of the fourteenth amendment to the Constitution of the United States.

IV.

The Court of Civil Appeals for the fourth supreme judicial district of Texas, erred in holding that the statute of the State of Texas, to-wit, the act of the 28th legislature of the State of Texas, regular session of 1903, chapter CXVI regulating street railway fares in certain cities and towns, said act being as follows. (Here follows a full copy of the Act for which see appendix) valid and not in conflict with or in violation of section 1 of the fourteenth amendment to the Constitution of the United States, because said statute of the State of Texas denies to the San Antonio Traction Company the equal protection of the law guaranteed to it by section 1 of the fourteenth amendment to the to the Constitution of the United States.

BRIEF OF THE ARGUMENT.

I

UNDER SECTION 7, ARTICLE 10 OF THE CONSTITUTION OF THE STATE OF TEXAS, THE POWER TO GRANT TO STREET RAILWAYS THE PROPERTY RIGHT AND FRANCHISE TO CONSTRUCT AND OPERATE A STREET RAILWAY WITHIN A CITY IS WITHDRAWN FROM THE LEGISLATURE AND CONFERRED, IF NOT BY EXPRESSED WORDS, THEN BY NECESSARY IMPLICATION UPON THE MUNICIPAL AUTHORITIES.

AUTHORITIES.

Sec. 7, Art. 10 of the Constitution of the State of Texas 1876 which reads as follows:

> "No law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town or village, or upon any public highway without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Mayor vs. Houston Street Railway Co. 93 Tex., 545-555.
Detroit vs. Citizens St. Ry. Co. 184 U. S. 369.
Dunn vs. Taylor, 80 Tex., 659.

In 1874 the original charter was granted to the San Antonio Street Railway Company by Special Act of the Legislature The Constitution of 1869 was then in force. This Constitution contained no limitation upon the power of the Legislature to grant rights and franchises to street railway companies in towns, cities, and other municipal subdivisions of the State. The Constitution was silent on the subject. Under the Constitution then in force, therefore, the Legislature could under its general and unlimited powers, in the special act incorpora-

ting the S.A.Street Ry. Company, have granted to that corporation, the right, privilege, and franchise, of constructing and operating its street railway on and over the streets of the City of San Antonio, upon such terms and conditions as the Legislature in its discretion, might prescribe. The Legislature, however, did not see fit to exercise this power to its fullest extent, but elected to limit the special act of incorporation to the granting of the franchise to be, and to authorizing the street railway company to construct such roads on any streets within the corporate limits of the City of San Antonio as might thereafter be agreed upon by the Mayor and Aldermen of the City of San Antonio, and the San Antonio Street Railway Company. The Act, in Section 8, expressly confers upon the municipal authorities, the power to prescribe the terms and conditions upon which the corporation should acquire the franchise to use the streets, and to grant to the corporation such privileges and rights as, in the discretion of the municipal authorities, was deemed best. The ordinance which was passed on October 5th, 1875, granting to the corporation the right to construct and operate its street railway on and over the streets of the City of San Antonio was an exercise of the authority granted to the municipal body by the Act incorporating the grantee of the privilege. Neither the Constitution of 1869 nor the Act of Incorporation of the San Antonio Street Railway Company contained any reservation of the right and power in the Legislature to repeal, change, or amend the Charter granted to the San Antonio Street Railway Company.

It is well settled by all the authorities that, in the absence of such a reservation in the charter, when accepted and acted upon, and the franchise granted by the City of San Antonio, under the legislative authority, when likewise accepted and acted upon, constituted a complete contract, which could not be impaired either by subsequently adopted constitutional provision, legislative enactment, or city ordinance. In 1875 the State of Texas adopted a new constitution, which went into effect on the 18th day of April, 1876. This constitution contained an inhibition against the legislature granting irrevocable and uncontrollable privileges, and providing that all pri-

vileges and franchises granted by the legislature or created under its authority should be subject to the control thereof (Section 17, Bill of rights, printed in the appendix.) This constitution of course, speaks only from the date of its adoption, and cannot relate back to the date of the granting of the Charter to the San Antonio Street Railway Company, so as to invest the Legislature with the power of repeal, change, or amendment which had not been reserved unto it either by the organic law or legislative enactment at the date the special act of incorporation was passed.

It is too well settled to admit of argument that whatever rights, privileges, and franchises the San Antonio Street Railway Co. acquired under the special act of incorporation, and under the city ordinance of date October 5th, 1875, were protected against destructive legislation, state or municipal, by the Constitution of the United States.

Until the adoption of the Constitution of 1875 the power still remained in the legislature to grant to the Street Railway Company additional rights and privileges, as could also the municipal authorities under the delegation of that power as contained in the act of incorporation, but neither authority could take away any that had already beon granted, accepted, and acted upon. If the mayor and aldermen of the City of San Antonio had, prior to the adoption of the Constitution of 1875, entered into other contracts with the San Antonio Street Railway Company, under which additional rights or privileges were granted to said company, the making of such contracts would have been a valid exercise of the continuing power conferred upon the municipal authorities by the act of incorporation. Such contracts, like the ordinance of 1875, would be wholly dependent upon the legislative authority conferred by Section 8 of the legislative charter of the street railway company.

However, in 1876, the date upon which the constitution of 1875 went into effect, full, complete, and exclusive authority over the entire subject matter was conferred upon the municipal body by a higher authority than the Legislature itself. The new constitution provided that "No law

shall be passed by the legislature granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railway." This provision of the Constitution has been before the Supreme Court of Texas in only two cases. and while in neither one of them does the court dwell at any great length upon the subject, it is disposed of in both cases tersely and decisively. In the case of Taylor vs. Dunn, 80 Tex., 659, Ch. J. Stayton says:

"The constitution withdraws from the legislature the powerto authorize the construction and operation of street railways within any city, town or village or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railway. Constitution, Art. 10, Section 7. By street railways, as used in this section of the Constitution was probably meant such railroads as are constructed and operated in towns, cities, and villages for carrying passengers, or like purposes, which are frequently propelled by power other than animal; but it tends to show that it was the intent to leave to the municipal authorities the right and power to determine whether streets should be used for railroads of any character constructed and to be operated only within the limits of the municipality."

In the case of Mayor et al vs. Houston Street R. R. Co., 83 Texas, 555, the Supreme Court says:

"While Section 7 of Article 10 of the State Constitution is entirely prohibitory and not permissive, still it is a clear recognition of the right of any city to give its consent to the use of its streets by street railway companies, and it contains no limitations on the length of time for which such consent may be given."

It is clear, therefore, that by Section 7, Article 10, of the Constitution of 1875, as construed by the Supreme Court of this state, in the two cases above cited,the power to grant rights, privileges and franchises in the city, was withdrawn from the

legislature, where it had theretofore rested, and conferred upon the municipal authorities.

This construction of the article in question is in full accord with the views of this Court as expressed in the case of Detroit vs. Railroad, supra, in construing the tram-railroad act of the State of Michigan. The act under consideration in that case authorized the organization of companies to construct and operate railroads in and through the streets of any town or city, but contained the following provision:

"Provided, however, that no such company or corporation shall be authorized to construct a railroad under this act trrough the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as the said authorities may from time to time prescribe."

The effect of this legislation was to confer upon the tramway companies their corporate existence, and to refer them to the city authorities for their street franchises.

It is noticeable that the provisions contained in the tramway act are couched in substantially the same language as is Section 7, of Article 10, of the Constitution of Texas of 1875. The Statute of Michigan, like the Constitution of Texas, is "entirely prohibitory and not permissive," still it was treated by this Court as a clear and unmistakable delegation by the Legislature to the municipal authorities of the power to grant franchises to the tram way companies, and to fix the rate of fare which they might charge the public for the service. Indeed, that such was its purpose and effect was so manifest that it was taken for granted by this Court and the only question arising in the case which was deemed worthy of consideration and discussion was as to whether, by the concluding sentence of of the proviso contained in the Michigan statute, the right was reserved to the city authorities to change, by subsequent legislation, the rate of fare fixed by the franchise as originally granted.

It can, we take it, be therefore assumed, without further discussion, that, as it has and ought to have been, construed, Section 7, of Article 10, of the Constitution of 1875, was intended to and did have the effect of conferring upon the municipal au-

thorities directly the exclusive power of granting street railway franchises over the streets within their municipalities. The power which had heretofore been delegated to the city authorities of the City of San Antonio by the act of incorporation of the San Antonio Street Railway Company was superceded by the power direct y conferred by the Constitution.

It was in the exercise, therefore, of the powers directly conferred by the Constitution that the city authorities of the City of San Antonio did, in 1899, enter into a new contract with the San Antonio Street Railway Company, under which the life of the franchise theretofore granted was extended, and the street railway company was granted the additional right, franchise and privilege of charging a five cent fare, in consideration of which the said company assumed new, and theretofore nonexisting burdens and obligations of heavy expenditures for street improvements.

It was in the further exercise of this constitutional power that the city authorities entered into the contract with the San Antonio Traction Company, on the 7th day of August, 1900, after the said Traction Company had acquired, by assignment, all of the rights and privileges theretofore granted by the City of San Antonio to the San Antonio Street Railway Company, confirming unto the said Traction Company all such rights and privileges. The ordinances granting these franchises were accepted, in due form, by the grantee, and thereby became completed contracts. Detroit vs. Railroad, 184 U. S. p. 368; Mayor et al. vs. Houston Street Railway Co., 83 Texas, p. 548; Railroad vs. Railroad, 166 U. S., p. 557; Pingree vs. Railroad, 118 Mich., p. 314.

II.

THE COMPLETED CONTRACTS BETWEEN THE CITY OF SAN ANTONIO AND THE SAN ANTONIO STREET RAILWAY COMPANY WHICH PASSED BY ASSIGNMENT AND CONFIRMATION TO THE PLAINTIFF IN ERROR, UNDER WHICH IT WAS GIVEN THE IRREVOCABLE RIGHT TO CHARGE FIVE CENT FARE, NOT HAVING BEEN ENTERED INTO BY THE LEGISLATURE OR UNDER ITS AUTHORITY, WAS NOT SUBJECT TO ITS CONTROL, UNDER THE RESERVATION CONTAINED IN SECTION 17, OF THE BILL OF RIGHTS, OF THE CONSTITUTION OF 1875.

It will appear from the foregoing statements of the pleadings and evidence that the validity of the Act of the Legislature under which the defendant in error claims the right to purchase half-fare tickets, as the said act is sought herein to be enforced against the plaintiff in error, was drawn in question on the ground of its repugnancy to the Constitution of the United States, because it impairs the obligation of the lawful, valid, and subsisting contract existing between the plaintiff in error and the City of San Antonio, and because it deprives plaintiff in error of its property without due process of law.

This question was considered and directly passed upon by the Court of Civil Appeals, from which this writ of error is sued out. The decision of that Court was in favor of the validity of the law.

The Court says:

"It would seem, however, that inasmuch as the City of San Antonio made no contract with the San Antonio Street Railway Company regulating or controlling the amount to be charged for fares over its lines until Mar. 16th, 1899 (if the ordinance of that date authorizing said company to charge 5c fare can be deemed a contract) which was twenty-three years after the adoption of the present Constitution which specially provides that all privileges and franchises granted by the legislature or created under its autho-

rity shall be subject to its control, and that no obligation or contract between the City and the present street railway company or between the State and such company was violated or in any manner impaired by the act of the legislature in question. For the right, by virtue of the ordinance of March 16, 1899, of the San Antonio Street Railway Company to charge 5c fare for one continuous passage over any one of its lines did not vest until after the present Constitution went into effect, and therefore such regulation of fare was subject under it to legislative control." Citing Adams vs. Yazoo, etc. R. R. 77 Miss. 194, 180 U. S. p. 1; G. H. & S. A. Ry. Co. vs. Texas, 170 U. S. p. 226: "But, however this may be, it is not being shown that appellant was incorporated prior to the time the Constitution of 1876 went into effect, it must be considered to have taken its charter, and all the provisions it contains, subject to the general laws of the state, and of such changes as may be made in such general laws, and subject to future constitutional provisions and future legislation. Penn. R. R. vs. Miller, 132 U. S. p. 75."

The principles announced by this Court in the cases of Adams vs. Yazoo, etc. R. R., Pennsylvania Railroad vs. Miller, and many other cases which might have been cited to the same effect, can have no application to the case at bar. In those cases, the railroad companies were relying upon contract rights claimed to have been acquired directly from the legislature. These cases merely announce the well established doctrine that a grantee of a legislative franchise takes the same subject to all the then existing constitutional and legislative provisions and reservations; and the equally well-established doctrine that such grantee of a legislative franchise cannot claim exemption from future general legislation, unless such exemption is granted either expressly or by necessary implication.

In the case of Pennsylvania Railroad vs. Miller it was held that a legislative grant of a franchise to build a railroad, and conferring upon the grantee the power of eminent domain, on condition that "such compensation should be made, secured or tendered to the owner or owners of any land or material taken as shall be agreed upon between the parties, or in such manner as the law provides," did not, either by express terms or by necessary implication, exempt the grantee of the franchise from the oper-

ation of the provision of the Constitution of 1873 which required municipal and other corporations and individuals invested with the privilege of taking private property for public use to make just compensation for the property taken, injured or destroyed, by the construction or enlargement of their works, railways or improvements.

In the case of Yazoo etc. R. R. vs. Adams, a number of companies had been created prior to the adoption of the Constitution of Mississippi of 1890, which were, after that date, consolidated. The consolidation was not affected by the transfer of the rights, privileges and franchises granted prior to the adoption of the new Constitution, but was affected by a contract under which the constituent companies were to go out of existence, their officers to to resign their trusts in favor of the officers of the new company which was incorporated after the adoption of the Constitution of 1890, the boards of directors of the constituent companies were to be supplanted by the board of directors of the new company, the stock of the old companies surrendered and new stock taken therefor, or, in lieu of that, the old stock should be recognized as the stock of the new company, and the road should be operated by men holding their commissions from the new company. The Constitution of 1890 contained a provision that every new grant of a corporate franchise should be subject to the provisions of the Constitution. It was held that as the consolidation resulted in the formation of a new company, after the Constitution of 1890 took effect, it was subject to its provisions.

It seems too plain to admit of discussion that the principles announced in these cases have no pertinency whatever to the question presented for decision in this case.

The true and only question involved here is whether a franchise granted by municipal authorities, in the exercise of a power conferred directly by the Constitution can be destroyed or impaired by the Legislature, because and for no other reason than that the same Constitution which vested this particular power in the municipal body, reserved to the Legislature the power to CONTROL THE PRIVILEGES GRANTED BY IT OR UNDER ITS AUTHORITY.

It has already been stated that Section 17 of the Bill of Rights of the Constitution of 1875 provides that no irrevocable

or uncontrollable grant of special privileges or immunities shall be made, but that all privileges and franchises GRANTED BY THE LEGISLATURE OR CREATED UNDER ITS AUTHORITY shall be subject to the control thereof.

It is not necessary for any of the purposes of this case to discuss the question as to whether or not the reservation of the control of a privilege or franchise involves the power to destroy. It is quite sufficient in this case to know, as had been endeavored to be pointed out, that the contract under which the plaintiff in error acquired the right, privilege and franchise to collect fare for its services to the public at the rate of 5c per passenger WAS NOT GRANTED BY THE LEGISLATURE, nor was the privilege and franchise CREATED UNDER ITS AUTHORITY.

It is quite true that the San Antonio Street Railway Company did, at the date the Constitution of 1875 went into effect, hold certain franchises by legislative grant. Indeed, all of the franchises which it then possessed, both to be and to do, were either granted by the Legislature or under its authority. None of them, however, were subject to legislative repeal, amendment, construction, or control, for the reason that no reservation of such a power existed at the time the grants were made. It is also true that the San Antonio Traction Company holds certain franchises granted to it by and under the authority of the Legislature. Its grant of right to exist as a corporation comes from that source. It is correctly held by the Court of Civil Appeals that, in the absence of proof to the contrary, it may be assumed, and in truth, is the fact, that the plaintiff in error has been incorporated since the Constitution of 1875 went into effect. Its right, therefore, to corporate existence, since it has been acquired from the Legislature since the adoption of the present Constitution, is not irrevocable or uncontrollable, but is subject to the control of the Legislature. The plaintiff in error, however, owns other privileges, rights and franchises which are irrevocable. Among these is the contract right and privilege of collecting 5c fares. This privilege and franchise was not GRANTED BY THE LEGISLATURE, or CREATED UNDER ITS AUTHORITY, but was granted by the Mayor and City Council of the City of San Antonio, and CREATED UNDER THE AUTHORITY OF THE CONSTITUTION

It can, as it must be, conceded, without in any manner affecting the decision of this case, that any and all franchises enjoyed by the plaintiff in error which have been granted since the adoption of the Constitution of 1875 by the Legislature, or under its authority, are subject to its control. It is possible, although not probable, that it would be held that the reserved power was broad enough to permit practical destruction by legislative enactment, of the franchises granted by the Legislature. If however, the franchise granted by the Legislature to the plaintiff in error since the Constitution of 1875 to-wit: the right to corporate existence, should be repealed, revoked, forfeited, or otherwise destroyed, the franchise which it holds under the grant from the City would continue to exist and be inviolate. These contract rights acquired by the plaintiff in error by grant from the City are property, and as separate and distinct from its corporate existence as any other property. "The franchise to be a corporation came from the State, and all that the company required of "the City was its consent to the laying down of the rails, and the "operation of its road through the streets of the City, and such "consent was to be given on terms and conditions to be agreed "upon. This consent when given, became a franchise granted "to the corporation and was property belonging to it." Detroit vs. Detroit City Ry., supra.

In the same case, this Court says:

"Altho' the Company by the Act under which it was incorporated, was limited in its corporate life to a term of 30 years from the date of its organization in 1862, the extension of the term of consent by the City carried such consent about 16 years beyond its then corporate life. Of course no one contends that this extension of the term for the use of the streets of the City in any manner affected the limit of the term of the corporate life of the company, but the limitation of its life did not prevent it from taking franchises or other property the title to which would not expire with the life of the corporation on itself. A corporation whose existence is limited to a term of years could always purchase the fee in property which is needed for the operation of the business. If, at the end of its term, its life were not extended, the property which it owned was an asset, payable to the shareholders for the payment of its debts, and, in a case like the present

where the consent was assignable and transferable, particularly by virtue of Section 15 of the street railway act, above set forth any company itself having corporate existence for that purpose, could purchase the outstanding term, and operate its road thereunder."

To the same effect is Water Co. vs. State, 88 Texas, p. 600.

The franchise, therefore, of the plaintiff in error, which it acquired under a grant from the legislature, is easily separable from its rights, privileges and franchises acquired under its contract with the City of San Antonio. The Constitution, of Texas provides that the first shall not be uncontrollable, and irrevocable, but shall be subject to the control of the legislature. The Constitution of the United States provides that the latter are sacred, and cannot be impaired or destroyed by State legislation. The Act of the legislature here brought in question, as it is sought to be enforced against the plaintiff in error,—is not an attempt to control the exercise of the franchise granted by legislative authority, but is an undisguised effort to impair one of the most valuable rights conferred by the contract with the City, and to deprive plaintiff in error of its property without due process of law, and without compensation. This the legislature is restrained from doing by the Constitution of the United States.

III.

THE EXCLUSIVE POWER CONFERRED BY SECTION 7 OF ARTICLE 10 OF THE CONSTITUTION OF TEXAS UPON THE CITY AUTHORITIES TO CONTROL THE USE OF THE STREETS OF THE CITY BY STREET RAILWAY COMPANIES, NECESSARILY INVOLVES THE RIGHT TO ENTER INTO A CONTRACT WITH A STREET RAILWAY CO., IMPOSING UPON IT SUCH BURDENS AND OBLIGATIONS AND CONFERRING UPON IT SUCH RIGHTS AND PRIVILEGES, INCLUDING THE RIGHT TO COLLECT A STIPULATED FARE, AS THE PARTIES TO THE CONTRACT MAY AGREE UPON.

This question is so fully discussed, and so conslusively settled in the case of Detroit vs. R. R., above cited, that no further citation of authority is deemed necessary.

In many important details the facts of the Detroit case are similar to those of the case at bar. In that case, as in this, the original franchise granted by the City was amended by a subsequent ordinance, which was duly accepted by the street railway company, under which "the duties and obligations of the company therein mentioned were largely increased, additional taxes were provided for; also extensions of its tracks, as stated in the ordinance." In this case the ordinance of 1899 imposed upon the street railway company new and heavy burdens of vast benefit to the public, and, in return therefor was granted, as was done in the Detroit case, an extension of the time of the franchise in which the fares to be charged by the company were fixed, thereby, at the same time, imposing a limitation and conferring a property right upon the grantee of the franchise. This court says in ~~district~~ Detroit case:

"The rate of fare is among the most material and important of the terms and conditions which might be imposed by the City in exchange for its consent to the laying of railway tracks, and the running of cars thereon through its streets." p. 384. And again,

"The fixing of rates is, as we have already stated among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed, for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the Company."

IV.

THE ACT OF THE LEGISLATURE UNDER WHICH THE DEFENDANT IN ERROR CLAIMS THE RIGHT TO BE TRANSPORTED BY THE PLAINTIFF IN ERROR UPON THE PAYMENT OF A 2½c FARE, AS THE SAID ACT IS SOUGHT TO BE ENFORCED AGAINST THE PLAINTIFF IN ERROR, IS VIOLATIVE OF THE PROVISIONS OF PARAGRAPH 1, SECTION 10, ARTICLE 1, OF THE CONSTITUTION OF THE UNITED STATES, BECAUSE, AS SO

ENFORCED, IT WOULD IMPAIR THE OBLIGATION OF A VALID AND SUBSISTING CONTRACT BETWEEN THE PLAINTIFF IN ERROR AND THE CITY OF SAN ANTONIO (AUTHORITIES ABOVE CITED.)

V.

THE DEFENDANT IN ERROR CLAIMS THE RIGHT UNDER THE LEGISLATIVE ACT IN QUESTION, TO BE CARRIED AS A PASSENGER FOR A 2½c FARE OVER A CERTAIN PORTION OF PLAINTIFF IN ERROR'S RAILROAD SYSTEM, WHICH IT IS, IN EFFECT, ADMITTED BY THE PLEADINGS, FORMERLY BELONGED TO THE SAN ANTONIO STREET RAILWAY COMPANY, AND, IF HE IS NOT ENTITLED TO DO SO, HE SHOULD BE DENIED THE RELIEF PRAYED FOR, EVEN THO' HE CLAIMS THAT, FOR THE 2½c FARE HE IS ENTITLED TO A CONTINUOUS JOURNEY TO AND FROM SCHOOL, IN THE COURSE OF WHICH HE PASSES OVER A PORTION OF THE RAILROAD SYSTEM WHICH HE DENIES EVER BELONGED TO THE SAN ANTONIO STREET RAILWAY COMPANY.

It is apparent from this record that the San Antonio Street Railway Company, which was created in 1874, and received its franchise in 1875, was the mother company owning a system of street railway in the City of San Antonio. This syst m was acquired, by assignment, by plaintiff in error. We think that the effect of the ordinances of August 7, 1900, and January 7, 1901, was to add the tracks of the companies of lesser importance that is to say: the San Antonio Edison Company, and the Grand Avenue Railway Company, to this system of street railways in the City, the probable effect of which would be to place all under the protection of the main franchise granted to the San Antonio Street Railway Company. This would undoubtedly be the reasonable construction to place on these ordinances, viewed from a practical standpoint. It could profit the defendant in error nothing for the court to hold that when he started on his journey from his home to McGruder's school, he was entitled to

ride along River Avenue and Grand Avenue for a 2½ cents fare, but that when he reached 10th Street he would come under the terms and provisions of the rate of fare fixed in the franchise to the San Antonio Street Railway Company, and would be compelled to pay a 5 cents rate. Neither would it profit him anything for the court to compel the Traction Company to sell him 20 tickets at the rate of 2½ cents each on which he could only ride along River and Grand Avenues, but could not ride along Austin Street, 10th Street or Avenue C. On the other hand, if it should be held, for the purposes of this case, that notwithstanding the ordinance of August 7, 1900, recognized the consolidation of all of these companies under one system, they should still be considered separate and distinct, it would necessarily result in some inconvenience and expense to the public. If they should be held to be separate and distinct for any purpose, they would, for all. The result would be that the plaintiff in error could charge a separate fare for each system. It seems to us that it must be held that the reasonable construction of these ordinances is to join the tracks of the old San Antonio Edison Co., and of the Grand Avenue R. R. Co. to the system of the San Antonio Street Railway Company, and place them under all the rights, privileges, and franchises, and subject to all the limitations,—particularly as to the rate of fare, prescribed inthe franchise granted by the City of San Antonio to the San Antonio Street Railway Company. It is, however, not necessary to rest the decision on this point, for the reason that the defendant in error seeks, by mandamus, to compel the Traction Company to sell him 20 tickets for 50 cents, and to permit him, on those tickets, to ride from his home, to McGruder's school, over River and Grand Avenues, Austin, Tenth Street, and Avenue C. In reply to the answer of the plaintiff in error filed in the State court that it was entitled, under the contract between the City and the Street Railway Company, to charge a fare of 5 cents for each passenger, the defendant in error, by his supplemental petition, denies that the tracks on River and Grand Avenues ever belonged to the San Antonio Street Railway Company, thus, in effect, admitting that the tracks over which he wishes to ride, situated on Austin and Tenth Streets, and Avenue C., did belong to and were ac-

quired by the plaintiff in error from the said San Antonio Street Railway Company.

It necessarily results that if the plaintiff in error is upheld in its contention that it cannot be compelled, under the Act of the Legislature in question, to sell to the defendant in error tickets at the rate 2½ cents each upon which he would be entitled to take the journeys to and from school; tickets which, under the very terms of the Act, he would not be entitled to purchase at the price tendered for any other purpose, the mandamus should be denied.

CHARLES W. OGDEN,
Att'y for Plaintiff in Error.

APPENDIX

AN ACT TO INCORPORATE THE SAN ANTONIO STREET RAILWAY COMPANY.

"Section 1. Be it enacted by the legislature of the State of Texas that J. H. Kampmann, H. B. Adams, Daniel Devine, E. D. L. Wickes, John Twohig, John Withers, and Peter Sheiner, of the City of San Antonio, County of Bexar, and their associates and successors are hereby declared a body corporate and politic, under the name and style of the "San Antonio Street Railway Company." By which name they may contract and be contracted with; sue to final judgment and be sued; plead and be impleaded issue bonds and borrow money for the construction, equipment, and maintainance of their roads, buy and sell real and personal estate, and generally to do all acts necessary to carry out the objects and designs of said company.

Sec. 2. The legal domicile of said company shall be in the City of S an Antonio.

Sec. 3. The object of said company is declared to be to build, equip, own, and operate street railways in the streets of the City of San Antonio, and also, in such parts of Bexar County as may be continuations of said streets or of said railroads; and this company, under this act, is authorized to build such roads on any street within the corporate limits of the City of San Antonio, as may hereafter be agreed upon by the Mayor and aldermen of the City of San Antonio, and the said "San Antonio Street Railway Company," with the right to use such motive power as may be agreed upon between this Company and the City Council of San Antonio.

Sec. 4. The capital stock of this company shall be two hundred thousand dollars, divided into shares of twenty-five dollars each; said shares shall be transferable on the books of the company in person or by attorney.

Sec. 5. Subscriptions for shares to the capital stock of this company shall be paid in such sums, and at such times as may be agreed upon by the by-laws of said company. When any stockholder shall make default in the payment of the assessment of his stock, it shall be sold by the president of said company, after thirty days' public notice, published in some newspaper in the

City of San Antonio, which sale shall be an absolute conveyance in fee simple of such stock to its purchaser, he also paying the remaining installments which may be due.

Sec. 6. This Company shall, at their first meeting, make by-laws for its government, not inconsistent with the constitution and laws of this State, or of this act of incorporation. No by-laws shall take effect until approved by a majority of the stock-holders.

Sec. 7. The parties named in the first section of this act or a majority of them, are hereby declared commissioners, whose duty it shall be within twenty-four months after the passage of this act, to organize said company as may be determined by a majority of them. The stockholders shall elect a board of not less than five nor more than seven directors, who shall elect from their number a president; and they shall elect such other officers as the by-laws may require.

Sec. 8. That all contracts made or entered into by and between the Mayor and aldermen of the City of San Antonio and the said company,or any privileges or rights granted by the said mayor and aldermen of the City of San Antonio to the said company shall be in all respects legal and binding on the aforesaid contracting parties.

Sec. 9. This charter shall remain in full force and effect for the period of fifty years.

Sec. 10. Be it further enacted that all acts, laws, or parts of laws, ordinance, or declarations conflicting with this act of incorporation be, and the same are hereby repealed; provided that nothing herein contained shall annul or set aside any ordinances or laws of the city council of the city of San Antonio.

Sec. 11. That this act shall take effect from and after its passage.

ORDINANCE OF OCTOBER 5th, 1875.

Be it ordained by the City Council of the City of San Antonio.

Sec. 1. That the privileges are hereby granted to the San Antonio Street Railway Company to construct and run a first class horse railway, with its necessary side tracks, switches, turn outs, and turn-tables, and that the rights, privileges, and franchises, are hereby granted to said railway company, for and during the term of the charter, upon the street avenues, plazas, alleys and bridges of said city, or upon such portions of the same, in or upon which the said railway may be completed within five (5) years from and after the passage of this ordinance; from the Alamo Plaza in the City of San Antonio to the neighborhood of San Pedro Springs, and upon such streets and avenues and plazas of San Antonio as may be suitable for the construction and use of a horse railway, whenever the interests of said railway company, or the public may require it.

Sec 2. That in constructing the road-bed of said railway upon any street or plaza, within the present of future limits of San Antonio, the said railway company shall conform to the grade of the streets of the City of San Antonio, through which said railway may be constructed. The grade of said streets, avenues and plazas to be determined by the City Engineer under the direction of the City Council, and in the construction of any road-bed, upon any street, avenue, or plaza, said work to be done under the supervision of the improvement committee appointed by the City Council, and all streets, avenues and plazas and crossing of streets or avenues shall remain in as good condition after said road bed is put down, as before the construction of said road bed.

Sec 3. That said company shall so construct and keep in a good condition the road running through any of the streets, avenues, or plazas within the corporate limits of the City of San Antonio, so as not to interfere with or obstruct the passage of the vehicles, or travel of pedestrians, and nothing in this ordinance shall be construed into the granting permission to said company to construct any road way or turn-table on Commerce Street, the same being expressly and excepted out of the permission herein granted.

Sec. 4. That said Company is hereby required to observe and abide by all ordinances now or hereafter existing, of the City of San Antonio, not inconsistent with the rights herein granted; and pay such taxes as may be properly assessed against them.

Sec. 5. That any person wilfully obstructing the cars of said company or railroad-bed or other fixtures of said company shall be fined not less than ten or more than one hundred dollars, to be recovered before the recorder of the city.

Sec. 6. That this ordinance take effect and be in force from and after its passage.

SECTION 7 OF ARTICLE 10 OF THE CONSTITUTION OF THE STATE OF TEXAS.

Sec. 7. No law shall be passed by the legislature granting the right to construct and operate a street railroad within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad.

SECTIONS 2, 4, AND 5 OF AN ORDINANCE DATED MARCH 16th, 1899, GRANTING AN EXTENTION OF TIME AND FIXING THE DATE AT WHICH THE RIGHTS, PRIVILEGES AND FRANCHISES OF THE SAN ANTONIO STREET RAILWAY COMPANY, AND OTHER COMPANIES, SHALL EXPIRE.

Be it ordained by the City Council of the City of San Antonio, that:

"4th. Said San Antonio Street Railway Company, and the said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails, and all the space between the double tracks, and twelve inches (12) on the outside of their tracks on any street occupied by them or either of them which shall, hereafter be paved by the City, as and when the City paves, and with the same material as used by the City, and shall keep the same in reasonable repair and in like condition as the City keeps adjoining streets.

That said street railway companies shall charge five cent fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.

Section 11. The rights, privileges, and franchises, or either of them herein referred to and hereby extended may be assigned by the grantee or grantees to any person or corporation and limitations of this ordinance shall apply to the assignee thereof.

Section IV. Said companies or either of them or their assigns shall file with the City Clerk on or before the first day of May A. D. 1899, its or their written acceptance of the terms and conditions of this ordinance, otherwise this ordinance shall have no force or effect.

Section V. Said companies shall be subject to all ordinances except insofar as such ordinances conflict herewith.

ORDINANCES OF AUGUST 7th, 1900.

Whereas, under orders of sale made and confirmed by the District Court of the 37th District of Bexar County, Texas, and conveyances down to them the San Antonio Traction Company acquired and became the owner of all property, estates, rights, and privileges of the San Antonio Street Railway Company, and the San Antonio Edison Company, and

WHEREAS, in the grants of rights and privileges to said four companies now defunct, limitations and duties valuable to the city and to the public were imposed which should be observed and performed by their successor companies, and

WHEREAS, the title to said franchises have been questioned by an opinion of the City Attorney, and the good faith and credit of the City demand that it shall fulfill its obligations entered into between it and the said companies, therefore

Be it ordained by the City Council of the City of San Antonio:

Section 1. That all of the rights and privileges heretofore granted by the City of San Antonio to the San Antonio Street Railway Company, be, and the same are hereby confirmed unto the said San Antonio Traction Company; and all of the limitations duties, contracts and obligations imposed upon and required of said San Antonio Street Railway Company and said San Antonio Edison Company by the aforesaid ordinance of March 16th, 1899, or any other valuable ordinance in force at the time of the acquisition of the property of said two companies by the San Antonio Traction Company shall be and the same are hereby imposed upon and required of said San Antonio Traction Company; and the said traction company shall within three days after the passage of this ordinance file with the City Clerk its written acceptance of the terms hereof.

ORDINANCE OF JANUARY 7th, 1901.

Be it resolved by the City Council of the City of San Antonio:

Section I. That the privilege be and is hereby granted to the San Antonio Traction Company to construct, own, and operate its lines of street railway, with the necessary tracks, side-track switches, turnouts, curves, poles, and wires, beginning at the intersection of Grand Avenue, and Avenue "C," connecting with the Traction Company's tracks on Austin Street, thence along Grand Avenue to River Avenue, thence along River Avenue to the head of the river, and to the Alamo Heights suburb to the City of San Antonio.

Section II. The rights, privileges, and franchises granted by this ordinance are subject to all the limitations and duties imposed by ordinances of the City of San Antonio and by the ordinance granting franchise and right to the said San Antonio Traction Company over other streets in the City of San Antonio and is for the term of the franchise for which the said San Antonio Traction Company now has and enjoys the privileges for its principal lines heretofore constructed and now owned and operated by it within said City.

Section III. That there be transfers given on the lines here granted to all lines over the city owned by the San Antonio Traction Company and connecting therewith.

SectionIV. That this ordinance take effect and be in force from and after its passage.

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Section III. That there be transfers given on the lines here granted to all lines over the city owned by the San Antonio Traction Company and connecting therewith.

Section IV. That this ordinance take effect and be in force from and after its passage.

SECTION 2 OF THE ACT OF THE LEGISLATURE OF THE STATE OF TEXAS, DATED APRIL 10th, 1903, UNDER WHICH THE DEFENDANT IN ERROR CLAIMS THE RIGHT TO BE TRANSPORTED OVER PLAINTIFF IN ERROR'S STREET RAILWAY SYSTEM FOR A FARE OF 2½c EACH.

Sec. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age, in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this state, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only on the presentation by the student desiring to purchase the same, of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half are only upon the presentation of such tickets.

SECTION 17 OF ARTICLE 1, OF THE BILL OF RIGHTS, AS CONTAINED IN THE CONSTITUTION OF THE STATE OF TEXAS.

Section 17. No person's property shall de taken, damaged, or destroyed or app'ied to public use without adequate compensation being made, un'ess by the consent of such person; and, when taken, exeept for the use of the State, such compensation shall be first made or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

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No. 131.

In the Supreme Court

of the United States.

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SUPREME COURT U.S.

SAN ANTONIO TRACTION COMPANY,
Plaintiff in Error,

vs.

GEORGE A. ALTGELT, suing herein by his next friend, GEORGE C. ALTGELT, *Defendant in Error.*

Writ of Error from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

MOTION FOR RE-HEARING BY PLAINTIFF IN ERROR.

CHARLES W. OGDEN,
Attorney for Plaintiff in Error.

J. R. Wood Ptg. Co 208 N. Presa Street, San Antonio, Texas.

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MOTION FOR RE-HEARING BY PLAINTIFF IN ERROR.

May it please the Court:

It is restpectfully suggested that after a careful examination of the opinion of this Honorable Court, it is thought that, with propriety, plaintiff in error may ask the Court to consider whether this case be not one in which it would be proper to grant a re-hearing, on the following grounds, to-wit:

FIRST.

The Constitution of the State of Texas, adopted in 1875, like similar constitutional provisions adopted by many States of the Union about the same time, withdrew, in express terms, from the Legislature the theretofore existing power to pass special acts granting to corporations the charter right to construct and operate street railways upon the streets of any of the cities within the State.

AUTHORITIES.

Section 7, Art. 10, of the Constitution of the State of Texas, adopted in 1876, reads as follows:

> "No law shall be passed by the Legislature granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Sections 1 and 2 of Article 12 of the Constitution of Texas, adopted in 1875 provides:

> "Section 1. No private corporation shall be created except by general laws."
>
> "Section 2. General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public, and the individual stockholders."

The general corporation laws of the State of Texas, as they existed in 1900, when the Plaintiff in Error was incorporated and acquired the property rights of the pre-existing Companies, provided as follows:

> "Art. 641. Private corporations may be created by the voluntary association of three or more persons for the purposes and in the manner hereinafter mentioned."

Article 642 of the Revised Statutes of Texas specifies fifty-four distinct purposes for which corporations can be formed, among which are the following:

> "For the constructing, acquiring, maintaining, and operating street railways, and suburban or belt lines of railway within and near cities and towns, which may also construct, own, and operate union depots."

Article 643 provides as follows:

"A charter must be prepared, setting forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted.
4. The term for which it is to exist.
5. The number of directors or trustees and the names of those who are the appointees for the first year.
6. The amount of the capital stock, if any, and the number of shares into which it is divided."

Article 644 provides that the Charter must be subscribed and acknowledged by three or more persons, two of whom must be citizens of the State.

Article 645 provides that "Such charter shall thereupon be filed in the office of the Secretary of the State, who shall record the same at length in a book to be kept for that purpose, and retain the original on file in his office. A copy of the charter, or the record thereof certified under the great seal of the state, shall be evidence of the creation of the corporation."

Article 646 prevides that "The existance of the corporation shall date from the filing of the charter in the office of the secretary of the State, and the certificate of the secretary of State shall be evidence of such filing."

Fort Worth Ry. vs. Rosedall Ry., 68 Tex., 177.
Mayor vs. Houston St. Ry. Co., 83 Tex., 548.
Dunn vs. Taylor, 80 Tex., 659.
People vs. O'Brien, 111 N. Y., 1.
Pacific Ry. Co. vs. Leavenworth, 1 Dillon Circuit Court Reports, 303.
2 Dillon on Municipal Corporations (4th Edition), Section 701 and note.

It is most earnestly, but with the utmost respect submitted that this Honorable Court has, doubtless through the imperfections in the presentation of the case on behalf of the plaintiff in error on the original hearing, fallen into a grave and serious error as to the plain, settled and accepted purpose, meaning and effect of the provisions of the Constitution of the State of Texas of 1875, bearing upon the questions involved in this case.

The contention on behalf of the plaintiff in error on the original hearing was, as is stated by the Court in its opinion that the power "to grant to street railways the property right and franchise to construct and operate a street railway within a city is withdrawn from the Legislature, and conferred, if not by expressed terms, then by necessary implication, upon the municipal authorities."

In denying the soundness of this contention the opinion uses language which indicates that counsel was unable to convince the Court that no remnant of the former power of the legislature to grant to street railway company, franchises to construct and operate street railways in cities was left unrevoked by the Constitution of 1875. In reviewing this question it is important that the Court should recall to its memory the history of constitutional provisions, such as those contained in the Constitution of Texas of 1875, and similar ones

which were incorporated about the same time in the organic laws of many of the States.

In Sec. 701 a, of the 4th Edition of his work on Municipal Corporations, Judge Dillon, after referring to the amendment of the Constitution of the State of New York, adopted Jan. 1st, 1875, which contains substantially the same provisions as applicable to this question, as are found in the Constitution of Texas, adopted in the same year, says:

> "Several other States have ordained constitutional provisions of the same general character, although some of them do not so distinctly protect the abutting owners. These salutary organic provisions, whose necessity originated in constantly growing private and public injuries and injustice arising from the free exercise of unrestrained legislative power, are founded upon a true conception of the nature of streets in cities so far as concerns the rights of the public therein * * *."

This distinguished writer and jurist says in the same section:

> "These constitutional changes mark a distinct stage in the progressive developement of our jurisprudence which we may well pausefully stop to consider."

In the celebrated case of People vs. O'Brien, above cited. the Court of Civil Appeals of New York, had before it the determination of the question of the effect of the amendment to the Constitution of that State of 1875, providing among other things:

> "The legislature shall not pass a private or local bill for any of the following cases; * * * granting to any corporation, association or individual the right to lay down tracks; granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever. The Legislature shall pass

> general laws providing for the cases enumerated in this Section. * * * But no law shall authorize the construction or operation of a street railway company, except upon condition that * * * the *consent also of the local authorities* having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad, being first obtained."

The Broadway Surface Ry. Co. was incorporated under the general incorporation laws of the State of New York, and acquired its franchise to construct and operate its road over streets of the City from the municipal authorities. The Court in an opinion concurred in by all of the Judges held that:

> "By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchise as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the constitution, could only be acquired from the city authorities, and they could grant or refuse it at their pleasure, The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right, but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase. The framers of the constitution, evidently treating the privilege as a valuable one, which should be disposed of for the benefit of the municipality, to those who should pay the highest price for it, gave the municipal authorities the exclusive right to grant the privilege, which had theretofore been exercised by the legislature alone, and authorized its acquisition by contract from such municipality."

In the case of Fort Worth Ry. Co. vs. Rosedale Ry. Co., above cited, the Supreme Court of the State of Texas, had

before it for determination the question as to the effect of the provisions contained in the Constitution of Texas of 1875, bearing upon this subject, to which reference is above made, and in an unanimous opinion laid down the same doctrine as did the Court of Appeals of New York in the O'Brien case. Chief Justice Stayton, writing the opinion for the Supreme Court, says:

> "Through its act of incorporation, the appellant acquired simply a corporate existence, through which it might conduct the business specified in its articles of incorporation, this being such as the general law, under which incorporation was effected, contemplates. This is the extent of the right and power acquired by the appellant through its articles of incorporation, which are not before us.
>
> The statute specifies the purpose for which, under it, corporations may be created by the voluntary act of the incorporators, and it declares the general powers which such corporations may exercise. One of these purposes is "the construction and maintenance of a street railway" but a compliance with the statute gives no right other than a corporate existence, and no power other than such as the law itself declares the corporation when created, may exercise, or such as may be fairly implied from the powers expressly conferred or the nature of the business to be carried on by the corporation. The appellant had the power to construct and maintain a street railway, and we may infer that it was incorporated for the purpose of constructing and maintaining such a road in the city of Fort Worth, for the statute requires the articles of incorporation to state certain facts. First: The name of the corporation. Second: The purposes for which it is formed. Third: The place or places where its business is to be transacted. Fourth: The term for which it is to exist. Fifth: The number of its directors or trustees, and the names and residences of those who are appointed for

> the first year. Sixth: The amount of its capital stock, if any, and the number of shares into which it is divided. (Revised Statutes, Arts. 566-567.)
>
> The articles of incorporation could not give any right to use a street, and it is a matter of no importance, in this respect, what recitals, other than those required by law, the articles of incorporation filed in the office of the Secretary of State may have contained. To acquire the right to use any of the streets in the city of Fort Worth for the construction and maintenance of its railway, the consent of the city had to be obtained. The Legislature, at the time the appellant was incorporated, through a special charter might have given it the right without the consent of the city to use any of its streets, but this was not done. The Legislature now has no such power. (Constitution, Art. 1, Sec. 7.)

It is respectfully suggested that if the court will again read the cases of Mayor vs. Houston Street Railway Co., 93 Texas, 545-555, and Dunn vs. Taylor, 80 Texas, 659, it will find that they, together with the Ft. Worth case from which the above quotation is taken, show, with absolute conclusiveness that the settled and accepted construction placed upon the provision of the Constitution of 1875 is that it takes away from the Legislature every vestige of its former power to exercise any control whatever over the subject of the construction and operation of street railways on and over the streets of any city. It will, it is confidently believed, be perfectly apparent to the court that, when viewed in the light of the well known history of this character of constitutional legislation, the construction which the Supreme Court of Texas has placed upon the constitution of this State is in perfect accord with the case of People vs. O'Brien, and many other cases which might be cited, in which similar provisions in the constitutions of other States have been construed, and given the

effect intended by the framers thereof.

Under that which, it is believed, has been shown to be the universally accepted construction of constitutional pravisions such as those contained in the Texas Constitution of 1875, the authority of the Legislature over street railway corporations is limited to the power to provide by *general laws* for their incorporation, whereby they become artificial beings, but which have no authority, by reason of their incorporation, to construct, own, or operate street railways in any municipality. The Legislature, by its general laws, can, and does, grant to such corporations the right to exist, transact business, and acquire and hold property, as artificial beings. It is freely admitted that all and everything that the Legislature grants is by Section 17, Article 1, of the Bill of Rights, subject to its control. The Legislature, however, does not, and cannot grant to such corporations property rights of any character. The Legislature of Texas has not, since the adoption of the present constitution, nor can it, pass any law which invades so much as a hair's breadth the absolute and exclusive power which the constitution confers upon municipal bodies to give or sell the property rights and franchises of constructing and operating street railways on the streets of the cities of this State.

SECOND.

In the absence of an unequivocal declaration to the contrary it must be held that the framers of the constitution intended that the power to enter into an inviolable contract, granting franchises to construct and operate street railways in cities, should be vested somewhere, otherwise there would be no possibility of inducing the investment of capital in public utilities of this character.

While it is thoroughly understood that the courts do not,

and should not, be deterred from placing upon any character of legislation its true and intended construction, however, disastrous might be the consequences to any public or private interest; it is, at the same time, respectfully submitted that it is proper, and, sometimes, necessary, to look to this phase of the matter for the purpose of determining what construction the legislators intended should be placed upon their enactments.

In the State of Texas there are a vast number of growing towns and cities, which, as yet, have no street railway systems, but to which, in time, public utility plants of character will become absolute necessities.

It is perfectly clear that under the constitution the legislature could not induce or authorize the investment of a dollar of private or corporate capital in such enterprises; and unless resort is had to the dangerous experiment of municipal ownership, the municipal authorities must have the power to offer capital a definite franchise, possessing the elements of permanency and security; otherwise the last street railway system in the State of Texas has been constructed.

In the case of People vs. O'Brien, above cited, the Court says:

> "When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country, the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question but that, in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative, authority, and as constituting property in the highest sense of the term."

It must have been known to the framers of the Constitution of the State of Texas that it is only in franchises of this indestructible character that capital would seek investment.

It is most respectfully submitted that the far reaching construction which has, in this case, been placed on the Constitution of Texas, should, in itself, be sufficient to make the court hesitate before reaching the definite and final conclusion, that it is the correct one.

It is earnestly insisted that the decisions of the Supreme Court of the State of Texas, to which reference has been made, should be sufficient to protect the Constitution of this State from a construction from which such disastrous results will flow.

It is also, with the utmost respect, submitted that if there was no decision by the Supreme Court of Texas, bearing upon the subject, it should be presumed and held that when the framers of the Constitution of Texas incorporated within that instrument the provisions in question and couched them in substantially the same language as had been theretofore used in other legislation, both statutory and constitutional, they intended to accomplish precisely the same results as were sought by the other legislative bodies in enacting similar legislation.

To provisions such as those under consideration a settled and accepted construction has been given by the highest courts of the land. The decision of this Court in the case of Detroit vs. Detroit, etc. Ry., that of the Court of Appeals of New York in the case of People vs. O'Brien, and many other cases that might be cited hold that where the power to grant street railway franchises is conferred upon municipal authorities by statutory or constitutional legislation, in the language employed by the Constitution of the

State of Texas, then an ordinance granting such a franchise, which is duly accepted, constitutes a contract which is binding on both parties thereto, and confers upon the grantee a property right in which he can invest his capital, with the positive assurance that it will be protected by the Constitutions of both the State and the Nation. The same construction should, without question, be given to the Constitution of Texas in this case, and thereby save it from having the effect of rendering it impossible, in this State, to obtain a street railway franchise within any City of this State, in which the most venturesome speculator would invest a dollar, and also save it from having the effect of destroying the value to the municipalities of such franchises.

THIRD.

Where the Constitution forbids the construction or operation of street railways upon the streets of any incorporated city "without the consent of the corporate authorities" the latter are not limited to a simple granting or denial of the right of way, but may prescribe conditiions on which they give their consent, and, if these are accepted by the street railway company, they are binding upon the parties.

Authorities.

Dillon on Municipal Corporations, Sec. 706.

Pacific R. R. vs. Leavenworth, 1 Dill., C. C., 393.

People vs. O'Brien, 111 N. Y., p. 1.

City of Cleveland vs. Cleveland Citizens R. R, Co., 194 U. S., 517.

Railroad vs. Railroad, 166, p. 557.

The power given to municipal authorities to grant or withhold their censent to the construction of street railways with-

in the municipalities, would be an valueless one, unless it carried with it the right and power to make a valid and binding sale of the franchise, or, in their discretion, to enter into a contract which would be valid and binding on both parties thereto.

There would be no value whatever, in the commercial world, to a street railway franchise, or to a contract granting one, in which the municipal authorities reserved the right to change, modify, take from, or add to its terms, conditions, and provisions. Likewise would such a franchise be valueless into which the law read the condition that, while binding on the parties thereto, it was, nevertheless, subject to change and modification, and could, at any time, be annulled, in whole or in part, by some third party or power. It must be perfectly apparent that if the Constitution of Texas reserves to the Legislature the power to change and modify a street railway franchise granting by the city authorities under the express power conferred upon them by the Constitution, then the result is precisely the same as though the provision conferring the power upon the municipality had been omitted from the Constitution.

It is a well known canon of construction of all instruments, which has been frequently applied by this court, that each and every part shall, unless the plain and unequivocal language of the instrument is to the contrary, be so construed as to create no conflict or inconsistency between its provisions. This rule is based upon the almost conclusive presumption that in no part of the instrument will its authors deliberately insert a provision which will absolutely destroy another provision which, with equal deliberation, is inserted in another part of the instrument.

Article 1 of the Constitution of the State of Texas, in Sec-

tion 17 of which this Court holds is reserved to the Legislature the power to legislate against the contract between the plaintiff in error and the City of San Antonio, was, by the framers of the Constitution, designated as a "Bill of Rights,"—or the article which deals with the fundamental principles of government.

Article 10, by Section 7 of which is expressly conferred upon the municipal authorities, to the exclusion of the Legislature, the power to grant street railway franchises, deals with the specific subject of "Railroads."

If there is any conflict between the general provision, and that dealing with the specific subject, then, under another well known rule of construction, the former must yield.

It is, with the utmost respect, submitted that to hold that section 17 of the Bill of Rights reserves to the Legislature the power to legislate against any provision in the contract between the plaintiff in error and the City of San Antonio, is to disregard both of the above stated elementary rules of statutory construction.

It would seem that both reason and authority would dictate that the only true rule of decision to apply in this case would be to hold that Section 7, of Article 10, of the Constitution of Texas, confers upon municipal authorities the full and ample power to grant street railway franchises within the cities of this State; and that this power necessarily involves the incidental and indispensable one of entering into a contract that could not be lawfully violated by either of the parties, or by any third party; that section 17 of the Bill of Rights does not, in fact, nor was it intended, to conflict with section 7, of Article 10; and that if, by any construction which can be placed on the Section of the Bill of Rights referred to, a conflict is made to appear, then such a construction must be

ignored as being one which was clearly not intended by the framers of the Constitution; and that, if there is an apparent and irreconciliable conflict between the two Articles, the one dealing with the specific subject under investigation should control.

In this connection it is respectfully suggested that if the Legislative enactment which, in this case, is attacked, is a valid enactment, and, as such, has destroyed that provision in the contract between the plaintiff in error and the City of San Antonio which provides that a fare of 5c shall be charged for each passenger, then the effect is that the entire contract has been destroyed, including those provisions which are beneficial to the City, and under which the plaintiff in error is annually expending large sums of money in the construction and maintainance of the City streets.

The court is most respectfully urged to examine the authorities above cited, and particularly, the case of the People vs. O'Brien, since it is earnestly believed that these decisions are well supported by reason and authority, and are conclusive of the questions involved in this case.

FOURTH.

The franchise granted by the City of San Antonio to the San Antonio Street Railway Co. survived the dissolution of that corporation, and passed, unimpaired, by assignment, to the plaintiff in error together with all the rights therein of the San Antonio Street Railway Co., which were by ordinance of the City of San Antonio, of date August 17, 1900, confirmed to the plaintiff in error, notwithstanding the recitation that the former grantee of the franchise was "now defunct," thus expressly recognizing the continued existence and binding force and effect as between the plaintiff in error and the City of the

contract evidenced by the ordinance of 1899, and the acceptance thereof.

AUTHORITIES.

People vs. O'Brien, 111 N. Y., p. 1.
Detroit vs. Detroit, etc. Ry. Co., 184 U. S., p. 369.
City of Cleveland vs. Cleveland, etc. Ry., 194 U. S., p. 517.

It is so well settled by all of the authorities that the property rights acquired in street railway franchises are not, in the slightest degree, impaired by a termination of the corporate existence of the grantee, that we will not trespass upon the valuable time of this Court by a discussion of this question. It is here referred to for the reason that, from certain expressions contained in the opinion of the Court, it is thought that possibly this Court attached some importance to the circumstance that the San Antonio Street Railway Co., had, as a corporation, passed out of existence.

FIFTH.

Under the Constitution of Texas the municipality of San Antonio, in granting the franchise in question, acted, not as an agency of the State, but as a creation of the State, upon which certain sovereign powers were conferred, to be exercised for the sole use and benefit, and to the best advantage of the municipality, and its people. In the exercise of these sovereign powers, conferred by the Constitution, the City acted independently.

This Court, in its opinion handed down in this case, uses the following language:

> "An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted declaring that all privileges granted by

> the Legislature shall be subject to its control. Clearly it is not deprived of that control by the fact that the contract was not entered into by the Legislature itself, but by a municipal corporation, since that is but an agency of the State to which is delegated the power to regulate street railway and other municipal franchises."

It is conceded that this would be the true and only rule to apply to the case at bar, if the power to regulate street railway franchises had been conferred upon the municipal authorities by the Legislature itself. In such a case the City would be but an instrumentality, employed by the Legislature for the purpose of granting the franchise, and the City would act as an agency of the Legislature.

To illustrate: The Constitution of Texas withdraws from the Legislature the power to grant street railway franchises within the limits of any incorporated City, but leaves its pre-existing power as to all other character of franchises unimpaired. The cities, therefore, grant electric light, water, and sewerage franchises only under the Legislative authority. It is freely conceded that, as to such franchises, it would make no difference whatever as to whether the grant of the franchise was made by the Legislature or by the cities acting under its authority. In either event the provision of Section 17 of the Bill of Rights would apply, and the power of the Legislature to control the franchises would be unquestioned.

In the case, however, of street railway franchises, the power is conferred upon the municipal authorities, to the exclusion of and not as an agency of the legislature by the Constitution itself, and, to such a case, the rule must be applied which is announced in the case of People vs. O'Brien, above cited, and it must be held that since the franchise was not granted by the Legislature, or under its authority, it has no control over it.

SIXTH.

It it because the contract in question was entered into twenty-three years after the adoption of the Constitution of 1876, and because it was made with the City that it cannot be impaired by the Legislature.

The court in its opinion holds that because the contract in questien was entered into after the adoption of the Constitution the rule laid down in Yazoo and Mississippi Railroad Co. vs. Adams, 180 U. S., p. 41, and other cases cited by the court, should be applied here.

If, as the court holds, the City, in granting this franchise and entering into this contract, acted as an agency of the Legislature, the cases cited would unquestionably be entirely decisive of this case.

If, upon the other hand, as we have endeavored to show, the City acted independently, and not as an agent of the Legislature, then the cases cited have no application.

To illustrate again:—If the City had granted an electric light or water franchise, after the adoption of the Constitution of 1876, it could have done so under the Legislative authority only. The grantee of such a franchise would take it subject to the provisions contained in Section 17 of the Bill of Rights, and, under the rule announced in Yazoo and Mississippi Railroad Co. vs. Adams, and other cases, the franchise would be subject to Legislative control.

In this case, however, the street railway franchise was granted, after the adoption of the Constitution, by the City, acting under its constitutional powers, and from a participation in the exersice of which the Legislature is expressly excluded.

SEVENTH.

The Constitution of the United States protects the plaintiff in error from all legislation impairing the obligation of the contract in question, no matter how insignificant may be the resulting inroad upon its revenues.

It is true, as stated by the court in the concluding paragraph of its opinion, that in this case there is no allegation or proof that the reduction in the price of the school tickets in question would seriously impair the revenues of the plaintiff in error. It is also true that it is customary for street railways to sell tickets to school children at reduced rates. These were the very considerations which prompted the plaintiff in error to pursue, voluntarily, the course with relation to the matter which is testified to by its President, Mr. Reagan Houston,—Trans. p. 21. When this controversy arose, the plaintiff in error was selling school children tickets at a half rate. It was pursuing this course voluntarily, rather than to engage in litigation over a matter in which small values were involved. This litigation arose out of the circumstance that the defendant in error was not accorded as prompt attention by the employes of the plaintiff in error as he demanded when he applied to purchase the tickets. He instituted this proceeding to compel the sale of the tickets, and the plaintiff in error, it is respectully submitted, was justified in defending the suit, not so much for the purpose of protecting its revenues against this comparatively small reduction, but rather to prevent, if possible, the rendition of a judgment, the effect of which would be to destroy the value of the contract in question, both to the City and to the plaintiff in error.

It is most respectfully submitted that if, as contended on behalf of the plaintiff in error, the legislation here involved im-

paired the obligation of a valid and binding contract, it should and will be declared invalid, no matter how great or small may be the amount of plaintiff in error's revenue it attempts to take away.

Wherefore, upon the foregoing grounds, plaintiff in error respectfully prays that this Honorable Court to grant a rehearing of said cause.

CHARLES W. OGDEN,
Attorney for Plaintiff in Error.

I Chas. W. Ogden, Attorney for Plaintiff in Error, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that same is not interposed for delay.

Charles W. Ogden

Supreme Court of the United States.

No. 131.—October Term, 1905.

San Antonio Traction Company, Plaintiff in Error, vs. George A. Altgelt.	In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

[January 22, 1906.]

This was a petition by Altgelt, suing by his next friend, originally filed in the District Court of Bexar County, for a peremptory mandamus against the Traction Company, a Texas corporation operating a street railway system, commanding it to issue to the plaintiff twenty half-fare street car tickets upon the payment of fifty cents, the same being at the rate of two and a half cents per ticket.

Both parties relied upon the legal effect of certain legislation of the State of Texas hereafter set forth. The mandamus was granted by the District Court, whose action was affirmed by the Court of Civil Appeals. An application for a writ of error from the Supreme Court was denied.

Mr. Justice Brown delivered the opinion of the Court.

This case depends upon the construction and validity of certain legislative acts of the State of Texas from 1874, the date of the original charter, to 1903, the date of the act complained of as an impairment of the Traction Company's contract.

The Constitution of 1869, in force at the time the original company was chartered, contained no limitation upon the power of the Legislature to grant franchises in towns, cities and other subdivisions of the State. The San Antonio Street Railway Company was incorporated in 1874 by special act, in which it was provided, Section 8, that "all contracts made and entered into between the Mayor and Aldermen of the city of San Antonio and said company, or any privileges and rights granted . . . to said company, shall be in all respects legal and binding on the aforesaid contracting parties," and by Section 9, that the charter "shall remain in full force and effect for the period of fifty years."

By ordinance of the City Council of October 5, 1875, privilege was granted to the San Antonio Street Railway Company to construct a first class horse railway, during the term of its charter, upon the streets of said city upon certain routes; but the ordinance did not fix the rate of fare to be charged for the transportation of persons over its projected lines.

By Article 10, Section 7, of the Constitution of Texas of 1876, it was provided that "no law shall be passed by the Legislature granting the right to construct and operate a street railway within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Section 17 of Article 1 of the Bill of Rights of the same Constitution provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof."

On March 16, 1899, twenty-three years after the adoption of this constitution, an ordinance of the city was passed granting an extension of time to the San Antonio Street Railway, and the San Antonio Edison Company, and imposing certain limitations upon the exercise of their franchises, among which was that "*said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.*"

It was also provided, by Section 11 of the same ordinance, that "the rights, privileges and franchises, or either of them herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, and the limitations of this ordinance shall apply to the assignee thereof."

On April 4, 1900, all the property of this company was sold under the decree of a State court to a trustee for the stockholders, subject to the payment of the debts of the company, and to the performance of all outstanding contract obligations, which were declared "a preference lien" against all the property sold in the hands of the purchaser. The conveyance expressly stipulated that "within the meaning of the words 'contract obligations' shall be understood any and all existing contracts of the said Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons now binding on said street railway company."

On August 7, 1900, the Common Council of the city passed an ordinance reciting the sale of the property and privileges of the former corporations, the San Antonio and Edison Companies, to the Traction Company, and enacting that all the rights and privileges thertofore granted to the former companies, which were said to be "now defunct," with all the limitations, duties, contracts and obligations imposed and required of the said San Antonio Street Railway Company were imposed upon the Traction Company. This ordinance was accepted.

The legislation remained in this condition until April 10, 1903, when

the Legislature of the State passed a new act, the second section of which reads as follows:

"SEC. 2. All such persons or corporations owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age, in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this State, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only on the presentation by the student desiring to purchase the same, of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only open upon the presentation of such tickets."

It is insisted by the plaintiff in error that, under Section 7, Article 10, of the State Constitution, above quoted, the power to grant to street railways the property rights and franchises, to construct and operate a street railway within a city, is withdrawn from the Legislature and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the Legislature granting the right to construct and operate a street railway without first acquiring the consent of the local authorities, but we see nothing to prevent the Legislature from chartering a street railway, provided such consent be acquired. Such we understand to be the ruling of the Supreme Court of that State in *Dunn* v. *Taylor*, (80 Texas, 659,) and *Mayor* v. *Houston Street Railway Company*, (83 Texas, 548.) But whether an act of the Legislature be necessary to charter a street railway is not involved in this case, as we are cited only to the original charter of the San Antonio Street Railway Company of 1874; although it is clear that a new charter would be inoperative to authorize the construction of the road without the consent of the municipal authorities.

Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract *pro tanto*, the question still remains whether the provision "that said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other," constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a con-

tract, it was still subject to the provision of the Constitution of 1876, which in Section 17 of the Bill of Rights declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof.

An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the Legislature shall be subject to its control. Clearly it was not deprived of that control by the fact that the contract was not entered into by the Legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises. We have repeatedly held that where a railway was originally chartered before a new constitution took effect, (and hence such charter was not limited thereby,) yet if such road be subsequently consolidated with other roads, or accepts new privileges, after a new constitution takes effect, all contracts, privileges and franchises conferred after the adoption of such constitution are subject to its provisions (*Shields* v. *Ohio*, 95 U. S. 319; *Railroad Co.* v. *Maine*, 96 U. S. 499; *R. R. Co.* v. *Georgia*, 98 U. S. 359; *Keokuk &c. R. R.* v. *Missouri*, 152 U. S. 301; *Yazoo etc. Railroad Co.* v. *Adams*, 180 U. S. 1, 23.)

In this case not only did the original San Antonio Street Railway Company become extinct by the foreclosure and sale of its property, but under the ordinance of August 17, 1900, declaring the prior companies to be "now defunct," the Traction Company also became the owner of all the property, assets, rights and privileges of another company, known as the San Antonio Edison Company, which thus became absorbed with the street railway company in the new corporation known as the Traction Company, which is admitted to have been incorporated since 1876, though the charter is not in the record. We are clearly of the opinion that under these circumstances it received its franchise under the Constitution of 1876, which forbade either the Legislature or the municipal authorities to make any irrevocable contract.

It is true that in this ordinance it was provided that all rights and privileges previously granted to the Street Railway Company and the Edison Company were conferred unto the Traction Company, including all the limitations, contracts and obligations, but this ordinance must be construed in connection with the Constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the Court of Civil Appeals of Texas in this case, which expressly waived the question whether the provision of the former ordinance fixing a five-cent fare constituted a contract or not, declaring that if it did it was subject to further legislative control.

Under the bill of rights of that Constitution the Legislature could not reduce the fares to a confiscatory amount or to an amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed, it was found in the opinion of the Court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the Act of 1903 is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment.

The judgment of the Court of Civil Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.